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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GULF COAST CABLE TELEVISION CO.,
Petitioner,

v.

AFFILIATED CAPITAL CORP.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Questions Presented For Review

1. Whether active interchange with political officials as part of a legislative lobbying program, and traditional political tactics and negotiation not otherwise unlawful, constitute a "conspiracy" between these officials and private parties in violation of Section 1 of the Sherman Act.

2. Whether, and to what extent, there is vitality to the so-called "co-conspirator exception" to the *Noerr-Pennington* doctrine.

Parties to the Action

The general partners of Petitioner Gulf Coast Cable Television Company are Clive Runnels, Warner Amex Cable Communications, Inc., and Warner Amex Cable Communications Company (arising out of a joint venture between Warner Communications Inc., a public company, and American Express Company, a public company). The limited partners are Louis K. Adler, David Askanase, J. Evans Attwell, Morton A. Cohn, Duncan Community Partnership Ltd. (John H. Duncan, General Partner), W.S. Farish III, Gerald D. Hines, R.A. Horne, William R. Lloyd, Jr., Ralph S. O'Connor, Edward Randall III, Eliza Lovett Randall, Katharine Risher Randall, Corbin J. Robertson, Rotan Mosle Inc. (Gary L. Wood, Vice President, General Counsel and Secretary), Clive Runnels, Mrs. R.E. Smith, R.A. Seaie, Jr., Co-Trustee of the following trusts created u/w/o R.E. Smith: Bobby Smith Cohn Trust, Sandra Smith Dompier Trust, Elizabeth Kirby Allen Trust, Anne Lindsay Cohn Trust, Courtney Lyle Cohn Trust, Sandra Ann Austin Trust, Susan Bellamy Austin Trust, Stacey Elizabeth Austin Trust, Shelly Marie Austin Trust. Gulf-Coast Bellaire Cable Television is the only subsidiary of Gulf Coast Cable Television Company.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Gulf Coast Cable Television Co. ("Gulf Coast") asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, sitting *en banc*, entered in this proceeding on July 16, 1984, as to which rehearing was denied by that court on September 17, 1984.

Opinions Below

The per curiam order of the *en banc* Fifth Circuit Court of Appeals denying Gulf Coast's petition for rehearing, and the dissenting opinion (Clark, C.J.), are reported at 741 F.2d 766. (A. 1)[1] The majority opinion of that court (Garza, J.), the concurring opinion (Higginbotham, J.), and the dissenting

1 References to the opinions below will be cited to the separately-bound Appendix to this petition.

opinion (Clark, C.J.), are reported at 735 F.2d 1555. (A. 3) The majority opinion of a panel of that court (Garza, J.), and the dissenting opinion (Clark, C.J.), are reported at 700 F.2d 226. (A. 39) The opinion of the United States District Court for the Southern District of Texas (Bue, D.J.) is reported at 519 F. Supp. 991. (A. 64)

Jurisdiction

The *en banc* judgment of the Court of Appeals was entered on July 16, 1984. A timely petition for rehearing was denied on September 17, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statute and Constitutional Provision Involved

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This case arises from the political process through which officials of the City of Houston, Texas awarded cable television franchises in 1978. Unsuccessful in obtaining a franchise, respondent Affiliated Capital Corp. ("Affiliated") sued petitioner Gulf Coast, one of five successful applicants, as well as Houston's Mayor and the city itself. The Fifth Circuit approved a $6.3 million antitrust treble damage award in favor of Affiliated. In so doing, it held that traditional lobbying activities lose their *Noerr-Pennington* antitrust immunity whenever government officials "active[ly] participat[e]" (A.117) with the private parties.

The Facts

In 1973, the City of Houston granted a single franchise to provide cable television service for the entire city. Acting pursuant to state and municipal law, Gulf Coast, an unsuccessful applicant for that franchise, organized a referendum among Houston voters, who expressed their unhappiness and decisively rejected the unitary grant. (A. 4)

By 1978, as constituent pressure for cable television mounted, the Mayor of Houston and City Council sought to avoid repeating the 1973 fiasco. In formulating a franchising plan less vulnerable to revocation by referendum, Mayor James McConn and the City Council necessarily were responsive to a number of political factors. They decided that minority participation was essential, that qualified local applicants would be favored, and that several franchises would be granted, each covering a different portion of the city. (A. 4-5)

Initially, four firms, including Gulf Coast, were among those submitting applications, and the city made it known that it did not relish having to choose one or more at the expense of the others. At the urging of the Mayor, the companies sought to draw up geographically complementary proposals that together

would cover the entire city. When Affiliated filed a belated application for a portion of the area requested by Gulf Coast, Mayor McConn advised Affiliated to seek a franchise elsewhere in the city. Gulf Coast already had reduced the area it proposed to wire so as not to conflict with the application of still a fifth company controlled by a politically influential attorney, since the Mayor had suggested the Council might reject Gulf Coast's entire application if that conflict remained. (A. 5-6, 12-13 n.5)

The parties could not work out complementary proposals incorporating Affiliated, and the city thus was forced to choose between competing applicants. The courts below found (and found as an antitrust violation) that in making the choice, the Mayor and Council were actuated not by "neutral" economic or other criteria related to the applicants' qualifications, but by overt political considerations. Thus, the courts below pointed to the fact that the city ignored the recommendations of (and dismissed) its retained expert, which were viewed as out of touch with political realities. (A. 6-8) And in what the lower courts seemingly viewed as key evidence of defendants' antitrust liability, the Mayor testified:

> Q. You didn't want to step on anybody's political toes, did you?
>
> A. Not if I could avoid it.
>
> Q. You didn't want to make any type of political decision where some powerful person like Walter Mischer would be unhappy, did you?
>
> A. Not if I could avoid it.
>
> Q. And if all of the parties could work things out, then you wouldn't have to make any type of decision, other than approving their agreement, isn't that correct?
>
> A. Yes, generally that is correct, yes, sir.
>
> Q. And isn't that what you wanted to happen?
>
> A. That would have been beautiful, if it could have happened that way.
>
> Q. But when it didn't happen and you had to make the choice between Southwest Houston [Affiliated's

named applicant for the franchise] and Gulf Coast, you stated that the other—you thought the other people were more politically powerful than Southwest, isn't that correct?

A. Yes, sir. I don't know if I said that, but I'll say it now.

(A. 14 n.5, 83-84)

Although the lower courts failed to note it, Affiliated did not hesitate to flex its own substantial political muscle. For example, Affiliated's principal, the Democratic State Chairman, and its attorney had tried to "pressur[e] . . . [one Councilman] into voting for" Affiliated's proposal, impressing upon him "that I owed them something and it was time for me to pay up by voting for their franchise."[2]

Despite these efforts, Affiliated's submission was rejected and the five applicants with the complementary proposals were enfranchised. (A. 8) This time, there was no referendum to overturn the decision in the political arena. Instead, Affiliated filed this antitrust suit to win in court the victory it was denied in the City Council.

Proceedings Below

By special interrogatories, the ju y was presented with two conspiracies allegedly violative of Section 1 of the Sherman Act. It found that the "boundary" agreement to divide the city into a number of non-overlapping areas was not an unreasonable restraint of trade. However, it did find a separate conspiracy composed of the successful applicants, the Mayor, and the city to exclude Affiliated from the competition for franchises, and awarded Affiliated damages of $2.1 million (trebled to $6.3 million). (A. 8-9, 67)

The district court granted judgment notwithstanding the verdict on the ground that there was no evidence that plain-

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2 Testimony of Councilman Judson Robinson, reproduced in the Appendix filed below by Gulf Coast, pp. 76, 79.

tiff's injury was caused by anything other than the boundary agreements, which the jury had found not to be unlawful. (A. 86-88) On appeal, Affiliated voluntarily dismissed the city as a defendant. A divided Fifth Circuit panel reversed the district court and reinstated the jury verdict, holding that the case involved a territorial market division *per se* violative of the Sherman Act. (A. 39)

On rehearing *en banc*, the Fifth Circuit again reversed the district court, but on a basis different from the panel's *per se* ruling. Despite a vigorous dissent by Chief Judge Clark (joined by judges Reavley and Jolly), the majority held that there was sufficient independent evidence to connect the plaintiff's failure to receive a franchise with a conspiracy between the successful applicants and city officials found by the jury to exclude competitors. It also held the Mayor immune from antitrust liability, although it said that "ruling does not effect his status as a conspirator." (A. 29)

Gulf Coast argued at every stage that it was protected by the *Noerr-Pennington* doctrine, which exempts from antitrust liability joint efforts to influence governmental action, regardless of anticompetitive purpose or effect. The Fifth Circuit rejected that argument. It adopted and approved (A. 24) the district court's opinion on this issue, which had applied the so-called "co-conspirator exception" to *Noerr-Pennington*. It held *Noerr-Pennington* immunity unavailable because the city officials had "actively conspired" with the private parties seeking governmental action. (A. 120)

The conduct of the Houston officials that was held "conspiratorial" was not such in any economic sense—there was no bribery, no splitting of franchise fees with the officials, and no secret ownership in any of the private firms by any official. Nor was any of the officials' conduct unlawful independent of the asserted "conspiracy." Instead, the official conduct found offensive consisted only of "vigorous involvement" (A. 24), "active participation" (A. 117), and "orchestration by public officials" (A. 117)—all of a wholly political nature. Political

give-and-take thus formed the gravamen of the officials' "involvement" in the conspiracy.

On Gulf Coast's further petition for rehearing, the Court of Appeals, in a *per curiam* decision, denied the petition. (A. 1) Once again, Chief Judge Clark, joined by the same colleagues, dissented. The dissent called the *en banc* majority's opinion "wrong, wrong, wrong." (A. 2)

REASONS FOR GRANTING THE WRIT

This case raises important questions for the due administration of the federal antitrust laws and their relationship to government petitioning and processes. The vitality and scope of the so-called "co-conspirator exception" to *Noerr-Pennington*, applied by the courts below, has never been directly addressed by this Court; the concept has now created a conflict in the circuits, has divided the lower courts generally, and has engendered severe scholarly criticism.

In this case, a tenuous "conspiracy" concept previously invoked only to avoid summary judgment has been used to impose antitrust liability—apparently for the first time[3]—for joint petitioning activity otherwise immune under *Noerr-Pennington*. The decision below would substantially abrogate *Noerr-Pennington*; indeed, it paradoxically exposes private citizens to the greatest risk of antitrust liability when their petitioning succeeds in engaging public officials in extensive dialogue in the political arena. The decision below is bound to stimulate new litigation against private persons and public bodies, in which federal antitrust courts and pre-trial discovery will focus on, and intrude into, the motives and activities of state and local legislators and other officials.

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3 *See* P. Areeda, *Antitrust Law* ¶ 203.3a (Supp. 1982). Research has uncovered no other reported decision imposing liability under the co-conspirator exception.

I

THERE IS CONFLICT AND INCONSISTENCY IN THE CIRCUITS.

In *Noerr*[4] and *Pennington*[5] this Court firmly settled that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *Pennington*, 381 U.S. at 670.

One passing comment in *Pennington*, however, spawned the "co-conspirator exception" and the substantial controversy that surrounds it. The Court said that the Secretary of Labor's action in setting a minimum wage "was the act of a public official who is not claimed to be a co-conspirator." 381 U.S. at 671. The Court did not elaborate. The Court mentioned this "exception" on only one other occasion, in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972). Again in passing, and without elaboration, the Court said "[c]onspiracy with a licensing authority to eliminate a competitor may also result in an antitrust violation." *Id.* at 513.[6]

This "exception" to *Noerr-Pennington* has now created a conflict in the circuits. The Fifth Circuit, in this case, found an antitrust conspiracy in the officials' active involvement in petitioner's lobbying activities.

But the Seventh Circuit specifically rejected the co-conspirator exception on facts strikingly similar to those at bar. In *Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975), an unsuccessful applicant for a cable television

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4 *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

5 *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

6 Two cases were cited by the Court, but as Professor Fischel has noted, "[t]he two cases cited in support of this proposition are of questionable authority." D. Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. Chi. L. Rev. 80, 114 (1977).

franchise brought an antitrust action against, among others, the company that received the franchise, the Mayor of Rockford, and a city alderman. The Mayor and the alderman had

> agreed with two of the corporate-officer defendants to use their best efforts to prevent plaintiff from getting a franchise, and "in exchange" each official was given "a substantial sum" as a campaign contribution.

Id. at 223. The City Council also had disregarded the recommendation of its own License Committee and awarded the franchise to defendant rather than to plaintiff because of " 'pressure brought on the Council by [the Mayor]' acting pursuant to the [above] agreement." *Id.*

The Seventh Circuit ruled for the defendants and declared:

> A holding that participation by members of the legislative body to the extent alleged here rendered the *Noerr* doctrine inapplicable to a campaign to induce legislative action, would . . . "be tantamount to outlawing all such campaigns" [citing *Noerr*].

Id. at 230. It would "abrogate the *Noerr* doctrine" to hold that a Sherman Act violation results when a legislator actively supports the cause of petitioners who would otherwise be protected by *Noerr-Pennington*:

> [W]e can find no rational basis in the authorities or plaintiff's argument for holding that such participation by a member of the legislative body as is here alleged should cause the Sherman Act to apply to an effort to induce governmental action that is otherwise protected by *Noerr*. Nothing in the *Noerr* opinion or any other case of which we are aware suggests any reason for believing that Congress, not having intended the Sherman Act to apply to combined efforts to induce legislative action, did intend the Act to apply if a member of the legislative body agreed to support those efforts.

Id.

Although the district court below in this case tried to distinguish *Metro Cable*, the cases are not meaningfully distinct. The district court merely said that the facts here "exceed" those in *Metro Cable* because the "public official and a governmental entity actively conspired with private participants in violations of the Sherman Act." (A. 120)[7] But the court did not identify the alleged "excess" nor did it explain why any such excess, if it could be identified, would vitiate *Noerr-Pennington* immunity.

Thus, the decision below is analytically in direct conflict with the Seventh Circuit's decision in *Metro Cable*.

More generally, the "co-conspirator exception" has been a source of substantial difficulty and inconsistency in the circuits since it first appeared twenty years ago. For example, in the same year the Seventh Circuit decided *Metro Cable*, the Third Circuit stated a contrary view. It said that when a complaint "goes beyond mere allegations of official persuasion by anticompetitive lobbying and claims official participation with private individuals in a scheme to restrain trade, the *Noerr-Pennington* doctrine is inapplicable." *Duke & Co.* v. *Foerster*, 521 F.2d 1277, 1282 (3d Cir. 1975).

In contrast, the District of Columbia Circuit has expressed doubt whether there is anything at all to what it called the "line of dicta" forming the co-conspirator exception. *Federal Prescription Service, Inc.* v. *American Pharmaceutical Ass'n*, 663 F.2d 253, 267 n.16 (D.C. Cir.), *cert. denied*, 455 U.S. 928 (1981). The court in that case quoted Professor Fischel's judgment that "in most cases the co-conspirator exception is unworkable and should not be recognized," *id.* at 264 n.11, a

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7 A later Seventh Circuit decision relied upon by the district court here (A. 111-12) never mentioned the "co-conspirator exception." *Kurek* v. *Pleasure Driveway & Park District of Peoria, Illinois*, 557 F.2d 580 (7th Cir. 1977), *vacated and remanded*, 435 U.S. 992 (1978), *reinstated*, 583 F.2d 378 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979).

conclusion echoed by other commentators. *See, e.g.*, R. Bern, *The Noerr-Pennington Immunity for Petitioning in Light of City of Lafayette's Restriction on the State Action Immunity*, 1980 Ariz. St. L.J. 279, 301 ("because of the ephemeral and inherently unworkable nature of the exception, it should not be recognized"); E. Kintner & J. Bauer, *Antitrust Exemption for Private Requests for Governmental Action: A Critical Analysis of the Noerr-Pennington Doctrine*, 17 U.C.D. L. Rev. 549, 586-87 (1984) ("In one sense, by adopting the policy or undertaking the conduct sought by the private party, the officials participate in every conspiracy.").

The Eighth Circuit, in turn, has twice refused to recognize a co-conspirator exception to *Noerr-Pennington*. In *Westborough Mall, Inc.* v. *City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983), there was evidence of an agreement between the private defendants and city officials to delay construction of plaintiff's project. Plaintiff contended that the participation of government officials vitiated *Noerr-Pennington* immunity. But the court expressly declined to base its decision upon the co-conspirator exception, noting the criticism by the Seventh Circuit in *Metro Cable*. In *First American Title Co.* v. *South Dakota Land Title Ass'n*, 714 F.2d 1439 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 709 (1984), *Noerr-Pennington* immunity also was applied despite governmental involvement with the private petitioners. The Eighth Circuit again cited *Metro Cable* and quoted Professor Fischel's condemnation of the exception as "unworkable." *Id.* at 1446.

Certiorari should be granted in this case so that this Court may address the "co-conspirator exception" squarely for the first time, clarify its scope, and thereby settle the confusion and divergence in the circuits. Although some courts have held that even patently illegal efforts to influence government are not cognizable under the Sherman Act,[8] the Court may con-

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8 *See, e.g., Schenley Industries, Inc.* v. *New Jersey Wine & Spirit Wholesalers Ass'n*, 272 F. Supp. 872 (D.N.J. 1967); *Cow Palace, Ltd.* v. *Associated Milk Producers, Inc.*, 390 F. Supp. 696 (D. Colo. 1975).

clude that the exception has validity to the extent the participating official has a direct financial interest in the result he seeks—for example, if he is bribed, or if he owns property that would be favorably affected. *See* Note, *Application of the Sherman Act to Attempts to Influence Government Action*, 81 Harv. L. Rev. 847, 856-57 (1968). No such situation, of course, is present in this case.

II

THE DECISION BELOW IS ERRONEOUS AND WILL HAVE IMPORTANT, FAR-REACHING CONSEQUENCES.

The decision below should be reviewed by this Court because it threatens to abrogate *Noerr-Pennington* and to spawn antitrust lawsuits that would inappropriately enmesh the federal courts in state and local political processes.

A.

In allocating cable television franchises, the Houston City Council was performing a legislative function, as the district court correctly recognized. (A. 100 n.21) The Council, a political body, and the Mayor, a political creature, made their decision in a political manner, rather than according to an economist's notion of welfare maximization or, as the majority below obviously would have preferred, on the basis of competitive bidding. Minority participation was thought desirable, local ownership was preferred, and firms with political clout were favored—and no bones were made about it. In addition to the Mayor's testimony quoted above at pages 4-5, a number of Councilmen testified that they would have voted to enfranchise Affiliated provided Gulf Coast was satisfied as well. (A. 14 n.5) When forced to decide between the two firms, political considerations prevailed.

It was clearly a distaste for the extent of the political activity, and for such "unwise" governmental decision-mak-

ing, that underlies the majority decision below. The court below inconsistently predicated liability both upon the city's "abdicat[ion]" (A. 5) of its decision-making role to the private parties, and upon its too-active "involvement" (A. 24) in the process. But as to both, the opinions below focus on the nitty-gritty of Houston's local politics.

For example, the majority below complained that the "strength [of the leading contenders] was not based on the merits of their proposals, [but] on the political power of the men behind them." (A. 5) The portion of Mayor McConn's testimony quoted above was introduced with the district court's comment that "McConn's concern was to keep politically influential groups content" (A. 14 n.5, *quoting* A. 83-84)—without an explanation why that concern should implicate the federal antitrust laws in any way.

The courts below failed to recognize that *Noerr-Pennington* protects precisely the sort of political behavior they found objectionable. In *Noerr*, "each group appears to have utilized all the political powers it could muster" in an attempt to obtain legislative action that would "help it [and] injure the other." 365 U.S. at 145. In *Noerr*, which involved "reprehensible" tactics, *id.*, the Court noted that its holding restored "the true nature of the case—a 'no-holds-barred fight' between two industries both of which are seeking control of a profitable source of income." *Id.* at 144 (footnotes omitted).

B.

Political activity cannot be transubstantiated into an antitrust violation by the lower courts' labelling of the city and the mayor as "conspirators." The district court held *Noerr-Pennington* inapplicable because the public officials went beyond "participation . . . [through] influence in favor of private parties," and reached the level of "actively conspir[ing]" with those parties. (A. 119-20) And the Court of Appeals approved the district court's circular and meaningless instruction to the effect that meetings with and favoring constituents are not

conspiratorial unless part of an illegal arrangement, and conspiracy is what makes it illegal. (A. 22-24 & n.6) Circularity was inevitable, for as courts and commentators have noted (see pp. 9-11, *supra*), circularity inheres in the concept of a "co-conspirator exception."

The very notion of an *antitrust* conspiracy in these circumstances was inapt. An antitrust conspiracy involves joint action that increases the market power of the collaborators beyond that which anyone alone could possess (*e.g.*, rival sellers fix prices); or that allows one party to accomplish an anticompetitive result that cannot be achieved unilaterally (*e.g.*, where a supplier agrees with his dealer on the latter's resale price); or, more generally, where one competitor promises to limit his own future freedom of action in the marketplace (as in a noncompetition agreement) in some manner other than a conventional exchange.[9] None of these core conspiracy ideas has any application to the present case. The "restraint" here was inherent in the city's power under state law, not disputed in this case, to award franchises. If the city prefers collaboration or cooperation among license applicants as a method of allocating a license or franchise, nothing in the antitrust laws forbids it.[10]

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9 The *de facto* limitation on future behavior that results from a conventional exchange, such as a seller's selling the only thing he has to sell, or the buyer buying the only thing he wishes to buy, is obviously not a conspiracy.

10 The decision below thus uses "conspiracy" language to impose a greater duty on a government agency than it would upon private parties. Suppose, for example, that McDonalds receives several applications for franchises in an area, that it regards the applicants as all qualified, that it might award four franchises to one applicant, but that it chooses to award one to each of the applicants and tells them to work out among themselves the prospective franchise locations within the area and who would get each one. The applicants have not engaged in any unlawful conspiracy, for they are implementing the will of the franchisor who is free to grant one or four and to choose which persons he will enfranchise. And certainly the franchisor's actions are not rendered unlawful by labelling him a conspirator.

The city here was completely in control throughout. Indeed, the very theory adopted below was that the city itself "orchestrat[ed]" (A. 117) the situation, but it acted unwisely.

In short, the majority below misused "conspiracy" language to find an *antitrust* restraint in the first instance.

C.

The Fifth Circuit majority's talismanic use of "conspiracy" language was not made any more appropriate by its focus on the level of the officials' political activity, which it found intolerable: "Numerous examples of official involvement in the conspiracy abound, which indicate that the trial court did not err in finding that the co-conspirator exception applied . . . [The] actions of the Mayor and City Council indicate a 'vigorous involvement in orchestrating certain aspects of the conspiracy.' " (A. 24)

None of the opinions below was able to delineate the level of "involvement" beyond which permissible "participation" becomes impermissible "conspiracy." Not only is there no "bright line"; there is no pertinent standard. Indeed, the opinions were unable to articulate why any Sherman Act interest *should* depend on the degree of the officials' involvement.

In holding that some unarticulable degree of participation by government officials will vitiate *Noerr-Pennington* immunity, the decision below only bears out the fears of courts and commentators that the co-conspirator exception would "abrogate"[11] or "swallow"[12] the *Noerr-Pennington* rule. In the field of government regulation and allocation of franchises, substantial interchange and negotiation between the regulator and

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11 *Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F.2d 220, 230 (7th Cir. 1975).

12 R. Bern, *The Noerr-Pennington Immunity for Petitioning in Light of City of Lafayette's Restriction on the State Action Immunity*, 1980 Ariz. St. L.J. 279, 300 n.119.

the private parties, or amongst the private parties and the regulator, is common. Often, it is done when the regulators prefer to gain compliance without suit or when, as here, the regulator understands the ability of a frustrated private party to obstruct the regulator's program by suing, organizing referendums, or the like. Here, for example, had the City Council not been responsive to political considerations, and granted a cable franchise on the basis of "objective" technical criteria, a politically powerful loser might well have organized another voter referendum and blocked the award, as happened in 1973. The process would then be back at square one, and the citizens of Houston would remain without cable television. In the face of an easily-activated referendum system, the sensitivity of the Mayor and City Council to political realities may have been the only means promptly to accomplish any cable franchising.

Moreover, as numerous observers of government processes have recognized, legislation (including that in a city council) itself is often the product of close collaboration between interested private parties (and their lobbyists) and elected officials (and their staffs). Legislative action does not result only from unsolicited and unrequited communications to legislators, after which they are convinced of the merit of the position urged and work unaided to further it. The symbiotic give-and-take process that characterizes the drafting of most legislation,[13] core political activity immunized by *Noerr-Pennington*, loses all protection under the Fifth Circuit's application of the co-conspirator exception.

A holding, such as that below, which makes *Noerr-Pennington* immunity dependent upon the degree of official involvement in the private parties' petitioning is thus fundamentally irreconcilable with, and threatens to undo, *Noerr* and *Pennington*.

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13 *See, e.g.*, V.O. Key, *Politics, Parties, & Pressure Groups* at 143-45 (5th Ed. 1964); D. Blaisdell, *American Democracy Under Pressure* at 218 (1957).

D.

The decision below also eviscerates *Noerr-Pennington* and chills private petitioning by making its legality depend upon a hindsight judgment about the wisdom of the public grant, which private petitioners have no way of predicting in advance. Indeed, the decision below would create substantial mischief by transforming federal antitrust courts into general reviewing bodies for the wisdom of state and local government decisions.

For the decision below actually would have federal antitrust courts review, and impose their own ideas of, the proper political behavior of states and municipalities. As explained by the concurrence below,

> the majority opinion ultimately rests on a duty of the city to justify [its action]; political patronage is not justification . . . [No] antitrust liability should result if [the court] decides that the [asserted] advancing of public policy is "legitimate" and outweighs any adverse effect on competition.

(A. 34) (concurring opinion of Judge Higginbotham). *See also* A. 40, where the panel majority opined that "[u]nfortunately, the Mayor did not stop [at favoring minority participation and local ownership in his] manipulation of the cable television franchising process."

The implications of this kind of approach for federalism and for new federal judicial involvement in state and local government affairs are drastic. For example, under the approach below, a federal antitrust court could decide, based on its own notions of legitimate public policy considerations, that minority business groups may petition local government for a franchise with antitrust immunity while similar petitioning by other business organizations subjects them to treble damage liability—or the reverse.

In cases of allocation of licenses and franchises, particularly, it is recognized that there are often no rational grounds for choosing one applicant over another. *See* S. Breyer, *Regulation*

and Its Reform, at 71-74, 95, 159-61 (1982). Surely substantial involvement by the relevant officials in negotiating or structuring the ultimate award or regulation of a license grant cannot appropriately be characterized as an antitrust conspiracy and be reviewed for wisdom by a federal antitrust court. The majority below believed that Houston's mayor and council negotiated or orchestrated unwisely in responding to "political muscle." But such behavior cannot be labelled an *antitrust* conspiracy with the favored persons unless the federal antitrust courts are to become, for the first time, the vehicle for rooting out "political muscle" as a factor in government regulation or allocation. If government officials' consideration of that factor is thought to be wrong, the answer is that "[t]he antitrust laws were never meant to be a panacea for all wrongs." *Parmalee Trans. Co.* v. *Keeshin*, 292 F.2d 794, 804 (7th Cir.), *cert. denied*, 368 U.S. 944 (1961).

The manner in which Houston politicians made their decision here may not have conformed to civics textbook notions, or economists' models, of local legislators impartially deciding what is best for all of the people. But *Noerr* rejects the notion that an antitrust court may impose any idealized political model upon state and local governments. Nor has federal law adopted the preferences of economists for particular methods of government allocation of such franchises or licenses as railroads, telephones, ambulance services, or broadcast facilities. Other statutes punish political activity deemed to be beyond acceptable bounds.[14] As evidenced by Affiliated's own conduct (*supra*, p. 5), political pressure tactics are part and parcel of legislative and executive decisionmaking.[15] It is left to the electorate to turn out of office those politicians whose

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14 Texas, for example, has a number of laws addressed to illegally influencing government officials. *See Tex. Penal Code Ann.* § 36.02 (bribery), § 36.03 (coercion of public servant), §§ 36.08, 36.09 (gifts to public servants) (Vernon 1974).

15 *See, e.g.*, D. Truman, *The Governmental Process: Political Interests and Public Opinion* at 4-8 (2d Ed. 1971); L. Milbrath, *The Washington Lobbyists* at 12 (1963); *The Federalist* No. 10 at 131 (J. Madison) (John Harvard Library Ed. 1961).

representation is unsatisfactory, as indeed Mayor McConn was turned out in 1981.

E.

The decision below is certain to stimulate new antitrust litigation, and federal courts' intrusion into government processes, that *Noerr-Pennington* sought to halt. The multimillion dollar jury award below will be a beacon for antitrust suits against both private parties and governments by disappointed vendors, license applicants, and unhappy litigants before zoning boards.[16] Successful applicants for government franchises, and the government officials making the grants, will be particular targets of such suits since, as noted, franchise awards typically involve extensive interchange between officials and applicants, and since any award tends to leave some disappointed applicants in its wake.

The decision below encourages antitrust plaintiffs to flood state or local government offices with document demands and deposition notices in an effort to build up the officials' "involvement," and to try to show that their decisions were colored by considerations of political clout, so as to meet the Fifth Circuit's test of official "conspiracy."

To forestall these serious consequences, this Court should review the Fifth Circuit's misapplication of the "co-conspirator exception" to *Noerr-Pennington*.

---

16 The recently enacted Local Government Antitrust Act of 1984, Pub. L. No. 98-544, will not solve the many problems created by the decision below. The Act extends antitrust immunity to local governments, and those acting under their direction, but only to the same extent such activity was immune under the "state action" doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943), and its progeny. All private petitioning protected by *Noerr-Pennington* but not by the "state action" doctrine remains unaffected by the new statute and hence vulnerable to the Fifth Circuit's co-conspirator exception. And, in any event, the Act does not bar suits for injunctive or declaratory relief. Moreover, there may be as much basis to argue that there is a "co-conspirator exception" to *Parker* immunity as there is to *Noerr* immunity. See *Parker*, 317 U.S. at 351-52. Thus, state and local governments, like private parties, remain at treble-damage peril under the Fifth Circuit's decision.

Conclusion

The petition for a writ of certiorari should be granted.

December 14, 1984

Respectfully submitted,

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84-951 (1)

No. ____

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GULF COAST CABLE TELEVISION CO.,
Petitioner,

v.

AFFILIATED CAPITAL CORP.,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the

United States Court of Appeals

For the Fifth Circuit

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741 F.2d 766 (1984), No. 81-2335.

AFFILIATED CAPITAL CORPORATION, etc.,
Plaintiff-Appellant,

v.

CITY OF HOUSTON, et al.,
Defendants,

Gulf Coast Cable Television and
James J. McConn,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas—
Carl O. Bue, Jr., *Judge*.
On petition for rehearing.

September 17, 1984.

Before CLARK, *Chief Judge*, GEE, RUBIN, GARZA, REAVLEY, POLITZ, TATE, JOHNSON, WILLIAMS, JOLLY, HIGGINBOTHAM and DAVIS, *Circuit Judges*.*

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* Judges Randall and Garwood did not participate in this decision. Judge Brown who was a member of the Court at the time of the en banc decision, took senior status subsequent to the decision and, therefore, is not qualified to participate in the order on petition for rehearing. Judge Garza, now a senior judge of this circuit, is participating as a member of the panel that initially considered the appeal now subject to en banc review. Judge Robert M. Hill was not a member of the court when this case was decided by the court en banc and did not participate in this decision.

PER CURIAM:

IT IS ORDERED that the petition for rehearing of Gulf Coast Cable Television filed in the above entitled and numbered cause be and the same is hereby DENIED.

CLARK, *Chief Judge*, with whom REAVLEY and JOLLY, *Circuit Judges*, join, dissenting:

I respectfully dissent from the refusal of the en banc court to grant rehearing for the reasons stated in my dissent, plus the following.

In their petition for rehearing, defendant Gulf Coast Cable Television irrefutably points out that the record does not suggest the slightest basis for the majority's assumption that in finding the boundary agreements proper the jury believed "they were passing on the question of whether it was better to have one franchise for the city or multiple franchises." 735 F.2d at 1555. The chief support which the majority urges for this critical assumption—that a jury note asked if a yes vote on question #3 obviated a need to answer question #1—is itself in error. The full note the jury sent the court posed alternative questions. It read:

> Assuming a "yes" answer to No. 1, are we to bypass No. 3?
>
> The second question is, "Assuming we want to vote "yes" on No. 3, is there any point in voting on No. 1?"

Obviously both questions were equally open at that point in the deliberations. All the jury wanted to know was whether the questions were mutually exclusive.

Having been put to answer both question #1 and question #3 (at the insistence of plaintiff), the answers the jury gave clearly were reconcilable only as the district court reconciled them. This appellate court's assumption about question #1 negates the jury's verdict. With all due respect, the majority's new en banc basis for decision, though not as sweeping as its per se panel ruling, is still wrong, wrong, wrong.

In the

United States Court of Appeals

For the Fifth Circuit

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735 F.2d 1555 (1984), No. 81-2335.

AFFILIATED CAPITAL CORPORATION, etc.,
Plaintiff-Appellant,

v.

CITY OF HOUSTON, et al.,
Defendants,

Gulf Coast Cable Television and
James J. McConn,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas.
En banc decision.

July 16, 1984.

Before CLARK, *Chief Judge*, BROWN, GEE, RUBIN, GARZA*, REAVLEY, POLITZ, TATE, JOHNSON, WILLIAMS, JOLLY, HIGGINBOTHAM and DAVIS, *Circuit Judges*.**

GARZA, *Circuit Judge*:

In *Affiliated Capital Corp. v. City of Houston*, 519 F.Supp. 991 (S.D.Tex.1981), the district court granted the defendant's

---

* Judge Garza, now a senior judge of this circuit, is participating as a member of the panel that initially considered the appeal now subject to *en banc* review.

** Judges Randall and Garwood did not participate in this decision.

judgment n.o.v. motion in an antitrust action because it believed there was insufficient evidence connecting plaintiff's theory of conspiracy to limit competition and its failure to receive a cable television franchise. A divided panel of this court reversed that decision holding among other things that the conspiracy complained of was a *per se* antitrust violation. *Affiliated Capital Corp. v. City of Houston*, 700 F.2d 226 (5th Cir.1983). We vacated that decision and decided to hear this case *en banc*, 714 F.2d 25 (5th Cir.1983). Because the district court's j.n.o.v. ruling can be reversed without reaching the issue of a *per se* violation, we again reverse the court below, and reinstate the jury verdict. The City of Houston is not a party to this appeal, having been voluntarily dismissed by the plaintiff on June 23, 1982.

I.

FACTS

The events leading to the litigation at bar commenced in 1972, when several firms sought cable television franchises from the city of Houston. After reviewing these applications the Houston Public Service and Legal Departments recommended two firms to the Mayor and City Council. The Mayor and City Council then awarded one corporation a franchise for the entire city. The unsuccessful franchise applicant, Gulf Coast Cable Television Co. [hereinafter Gulf Coast] then secured a petition of more than five hundred Houston voters calling for a referendum on the Council action.[1] The voters soundly defeated the grant of a monopoly franchise.

In 1978 the city was again considering granting cable franchises. Mayor McConn, who had been a city councilman in 1973, wanted a plan that would not be overturned by the voters. The Mayor testified at the trial below that he, therefore, determined that several franchises would be granted. In addition, he decided that qualified, local applicants would be

1. Tex.Rev.Civ.Stat.Ann. art. 1181 (Vernon 1963) and the Charter of the city of Houston provided for this procedure.

favored. Finally, he concluded that any plan should include minority participation. Defendant Gulf Coast was the first of many concerns to seek a cable television franchise in 1978.[2] There is ample evidence that the city of Houston did not even initiate the franchise process; defendant Gulf Coast approached the city and made application for a franchise. The city of Houston is a highly desirable cable television market. The city, however, made no effort to take advantage of its position by publicizing its intention to award franchises. Instead of following this common practice, the city passively accepted applications as they arrived. From the many applications submitted to the Public Service Department, four emerged as strong contenders. Their strength was not based on the merits of their proposals, however, but on the political power of the men behind them. These four actors were Gulf Coast, Houston Cable Television Co., Houston Community Cable Television Co., and Meca. Mayor McConn had let it be known that he did not want to choose between competing applicants. He wanted the applicants to cooperate, resolve any overlaps in their territories and present him with a finished product. He abdicated his responsibility in the franchising process to a group of powerful Houston businessmen. In turn, these businessmen became friendly competitors in an effort to divide the city among themselves and prevent competition from any outsiders.

These businessmen and their attorneys met, and over a period of time mutually agreed on franchise areas. After this agreement, the Mayor informed Gulf Coast that another applicant, Westland Corporation, a group primarily controlled by the Mayor's personal attorney, had to be added to the ranks. A portion of the area Westland desired was in the territory sought by Gulf Coast. Conscious of both the political realities of the situation and the need to avoid competition among potential

---

2. Gulf Coast is a limited partnership that operates solely in the cable television business. After its unsuccessful bid for a franchise in the city of Houston in 1972, Gulf Coast remained in business and obtained franchises for a number of small cities within the Houston Metropolitan area.

franchises, Gulf Coast decided to redraw the franchise boundaries in order to comply with McConn's wishes. After this arrangement was completed the businessmen were ready to present proposed franchises to the Mayor and City Council for approval.

While Gulf Coast and the above-mentioned applicants were cutting out competition by carving up the city amongst themselves, the plaintiff, Affiliated Capital Corporation, [hereinafter Affiliated] entered the picture. Affiliated is a publicly-held corporation that owned a savings and loan association. A federal prohibition against owning both a savings and loan association and a cable television system prevented Affiliated from making application for a franchise until it sold the savings and loan association. After the mid-September sale, Affiliated hired a local attorney to investigate the state of the franchising process. When the attorney contacted counsel for Gulf Coast, he was informed that Affiliated was too late because the "pie had been cut." Surprised by this news, Affiliated's president, Billy Goldberg, went to visit the Mayor who assured him that there was still time for Affiliated to receive a fair hearing. Consequently, Affiliated made application for a cable television franchise on October 16th.

Although the city never advertised its intention to award cable television franchises, it did undertake other measures calculated to give the appearance that the citizens of Houston would receive quality cable television service. The Public Service Department prepared a questionnaire, which was distributed to all franchise applicants. The city hired a consultant, Dr. Robert Sadowski, to evaluate the applicants based on their responses to this questionnaire. By the middle of November, Dr. Sadowski had completed a report that was highly critical of the franchising/selection process. He warned that it was irrational to allow the applicants themselves to divide the city into franchise territories. He concluded that such a procedure did not give the citizens of Houston the best possible cable television service.

In addition to this general indictment of the process, Dr. Sadowski recommended that only two of the applicants, Meca

and Cable-Conn, be awarded the franchise areas they sought.[3] He argued that three applicants, Houston Cable, Westland, and Houston Community Cable, be rejected and that the size of defendant Gulf Coast's service area be reduced substantially. He apparently had doubts about the ability of Gulf Coast to service even this smaller territory so personally inspected the facility. Shortly after this visit, Sadowski was fired. His conclusions were altered before the report was publicized. The five ultimately successful applicants were pronounced qualified.[4]

The City Council then began taking final action on the franchise applications. The president of Affiliated appeared before City Council and requested that his application be given due consideration. Instead of due consideration, the City Council (through Councilman Johnny Goyen) admonished Affiliated to go and work out an agreement with the defendant and the other above-mentioned applicants. Goyen said:

> "Mr. Goldberg, let me address Council's wisdom. As these applications came in, they were sent to the Legal Department. Obviously, a number of lawyers got together and did whatever they did. I was not privy to it nor did I want to sit in on any meeting.
>
> Apparently, they came up with the formula that those applicants agreed upon. I was hoping that your situation might end up in the same pot as the others, whereby there would be some kind of recommendation coming before this Council, and this Council would not have to carve

---

3. Doctor Sadowski never evaluated Affiliated's application because it was submitted after his employment had been terminated.

4. Shortly before the City Council considered the franchise ordinances, the Public Service Director submitted a letter to the City Attorney to the effect that he lacked the information necessary to judge the merits of each application. In relevant part, the letter concluded that "[w]hile these issues may have been considered by the drafting principals, and may have been addressed satisfactorily by them, I have no way of knowing this." Record on Appeal, vol. 14, at 616. The "drafting principals" were later identified as the attorneys for certain franchise applicants.

> from one to give to another which we have not had to do in the past and which I do not want to do now nor do I intend to.
>
> I do not want to taketh away and giveth to somebody else, because I haven't had to do that in the past. You have a very competent attorney, and the other people have very competent attorneys. What I would like to see done, and it might take a motion to get this done, is to send this to the Legal Department and try to work something out.

Plaintiff's Exhibit 150, at 27-28.

The message to Goldberg was clear: it was not the Council, but rather private businessmen who would decide the future of cable television in Houston. When Mr. Goldberg did not make an agreement with those businessmen, the City Council and Mayor voted for the convenient franchise package presented by Gulf Coast and the other conspirators.

Affiliated then filed this suit alleging that defendants had engaged in a conspiracy to prohibit its entry into the Houston cable television market, thereby violating section 1 of the Sherman Act. Specifically, the plaintiff claimed that certain applicants for cable television franchises agreed to define the territories in which they would apply for franchises, so that no two members of the conspiracy would compete for the same territory. In addition, plaintiff charged defendants with participation in a more general conspiracy to limit competition for cable television franchises by excluding non-conspirator competitors.

II.

DISTRICT COURT JUDGMENT

At the close of evidence in the trial of the instant case, the jury was presented with a series of interrogatories. The relevant interrogatories and jury responses are reproduced below.

> INTERROGATORY NO. 1
>
> It is established that two or more franchise applicants, including defendant Gulf Coast, participated in agree-

ments on boundary lines so as to divide the geographic areas for which these applicants would seek cable television franchises. Do you find from a preponderance of the credible evidence that these arrangements were part of a conspiracy in unreasonable restraint of trade, in violation of Section 1 of the Sherman Act. Answer "yes" or "no."

ANSWER: No.

INTERROGATORY NO. 3

Do you find from a preponderance of the credible evidence that one or more of the defendants participated in a conspiracy in unreasonable restraint of trade to limit competition for cable television franchises, in violation of Section 1 of the Sherman Act? Answer "yes" or "no."

ANSWER: Yes.

INTERROGATORY NO. 4

Do you find from a preponderance of the credible evidence that any of the following persons participated in that conspiracy? Answer "yes" or "no."

a. City of Houston

Yes

b. Mayor Jim McConn

Yes

c. Gulf Coast Cable Television

Yes

INTERROGATORY NO. 5

Do you find from a preponderance of the credible evidence that either of the conspiracies, if you have so found in answer to Interrogatories 1 or 3, proximately caused injury to the plaintiff's business or property? Answer "yes" or "no."

ANSWER: Yes.

INTERROGATORY NO. 6

What sum of money, if paid now in cash, do you find from a preponderance of the credible evidence would fairly and reasonably compensate plaintiff for the damages, if any, you find plaintiff has incurred? Answer in dollars and cents, if any.

ANSWER: $2,100,000.00.

In a post-trial motion, defendants argued for judgment notwithstanding the verdict on three grounds. First, the defendants asserted that all of plaintiff's evidence had related to boundary agreements, found legal by the jury's answer to Interrogatory No. 1, so that there was no evidence to support the jury's finding of an independent conspiracy under Interrogatory No. 3. Second, they claimed that there was no evidence exclusive of boundary agreements to support the proximate cause finding in Interrogatory No. 5. Finally, defendants contended that the *Noerr-Pennington* doctrine mandated judgment notwithstanding the verdict.

In a thorough and carefully researched opinion, *Affiliated Capital Corp. v. City of Houston,* 519 F.Supp. 991 (S.D.Tex. 1981), the district court granted the relief requested by the defendants. Although the trial judge found substantial evidence independent of the boundary agreements to support the answer to Interrogatory No. 3,[5] he concluded that plaintiff had

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5. In response to defendant's motion, plaintiff cited a wealth of evidence to demonstrate a second theory of conspiracy. In its memorandum opinion the court set out all the evidence which it agreed would support a second theory of conspiracy to limit competition:

By late August 1978, Clive Runnells, on behalf of Gulf Coast, had agreed with Meca that they would be friendly competitors. Testimony of Clive Runnells. Al Levin, Affiliated Capital's lawyer during the franchising process, testified that by September 20, 1978, he contacted Bill Chamberlain, an agent of Gulf Coast. Chamberlain told him that Gulf Coast's attorney Bill Olson "was a pushing force of the cable TV situation at that point." Levin further testified that he then contacted Olson and Olson told him, "as far as I am concerned, Al, it's too late; the pie has already been cut." On the day before this telephone conversation between Levin and Olson, Olson had told Jonathan Day, an attorney for Houston Cable, that Olson was "trying to put a map together" and that "most of the areas are defined on eastern side." Plaintiff's exhibit 63.

On September 28, 1978, a lawyer for Houston Cable wrote to the lawyer for Gulf Coast regarding the franchise ordinance:

> Enclosed is a copy of the proposed cable television ordinance marked to show deletions and additions, including some recommended by our FCC counsel. Also enclosed is an unmarked copy for your convenience.
>
> The enclosed form of the proposed ordinance has been placed in our word processing equipment. Consequently, any changes or additions

failed to demonstrate that its injury was caused by anything other than defendants' boundary agreements. Thus, he

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you wish to make can be easily accommodated. As we discussed, the enclosed form should be considered as an internal working draft, so that we can reach an agreed proposal to present to the city.

Plaintiff's exhibit 14. A week later he wrote another letter recounting that they had met on this franchise ordinance, and noting their discussions of various provisions of this proposed ordinance, including the provision with respect to the percentage of the City's interest in the gross revenues from the ordinances:

> Enclosed is a revised form of CATV ordinance with the changes we discussed at our last meeting in Section 8.G; Section 10.B; Section 12.H, J, and M; and Section 23.A.
>
> Also enclosed is a suggested revision to Section 20.A regarding the three percent of gross revenue issue in the event we are unsuccessful in limiting the franchise fee to regular subscriber service.
>
> If you have further comments or suggestions regarding this proposed form of ordinance, please let me know.

Plaintiff's exhibit 15. None of the referenced sections of the proposed ordinance relates to boundaries.

In October 1978, Runnells and others met with Mayor McConn. At that meeting, Runnells was informed that McConn wanted Westland to have a franchise. Westland had applied for a portion of the area sought by Gulf Coast, and the Mayor indicated to Gulf Coast that a general area, Westbury-Meyerland, was what he wanted Westland to have. Testimony of Clive Runnells; Testimony of James McConn.

On November 22, 1978, notice of the November 29th City Council agenda indicated that six (6) ordinances, five of which ultimately were approved, would be considered. On November 27, 1978, the attorney for Houston Cable, one of the applicants scheduled on the upcoming agenda, sent a final proposed cable television ordinance to the City Attorney:

> Enclosed is a revised form of the proposed cable t.v. ordinance which includes the modifications made this week-end.
>
> In order to meet the proposed time schedule, any further revisions must be agreed by 12 noon on Tuesday, November 28. Final proofing of the enclosure will be completed by that time.

Plaintiff's exhibit 29. He also sent a copy of the ordinance to Gulf Coast's attorney, who had discussed it with the lead counsel for Houston Cable earlier that morning:

> Enclosed is the proposed cable t.v. ordinance which Jonathan Day discussed with you this morning. Also enclosed is a copy of the transmittal letter to the City attorney.
>
> I have marked signifcant changes in red in order to facilitate your review. If you have any questions or comments, please let me know.

footnote continued on next page

reasoned that there was no evidence to support Interrogatory No. 5:

Plaintiff's exhibit 30. The next day Houston Cable's attorney sent copies of the ordinances to the ultimately successful applicants. The proposed ordinances were complete except for the names of the applicants and their proposed service area. Plaintiff's exhibits 32 & 189. The successful applicants then filled in the blanks with their names and service areas, and forwarded the ordinances to the City Attorney. Some applicants sent their proposed ordinances back to the Houston Cable Attorney who then forwarded them to the City. Plaintiff's exhibit 35.

The agenda for the City Council meeting of November 29, 1978 contained six (6) cable television franchises, not including plaintiff's, Plaintiff's exhibit 33; those ordinances had been placed on the agenda on or before November 22, 1978, Plaintiff's exhibit 174. When Affiliated attorney Levin heard of this, he contacted Assistant City Attorney Adrian Baer. Baer relayed the following information to Levin:

> [T]he Mayor and City Council had made their decision, and [Baer] said, 'I learned this directly from the Mayor, the franchises are non-exclusive, he does not know about the areas, it's still being worked out by Williams and Baer . . . so the net result will be a de facto exclusive.'
>
> He [, Baer,] explained to me that there were—the decisions as to who was going to get what areas, specifically in terms of the actual boundaries, were still under negotiations, but the decision as to who was fait accompli.

Testimony of Al Levin; Plaintiff's exhibit 106.

After an on-site inspection of the Gulf Coast's Bellaire facilities, Sadowski, the consultant hired by the City of Houston, told Earle, Director of Public Service, and Baer, Assistant City Attorney, that he would reject Gulf Coast's application. The next morning, Sadowski was fired. One day later a messenger from Earle retrieved the notes Sadowski had made concerning the applications. In his notes, Sadowski had not recommended that Gulf Coast's application be rejected, in spite of his oral suggestion to that effect to Earle and Baer, and he testified that he would have made no substantive changes in his report after the visit to Gulf Coast's facilities. He had recommended in his report, however, that Gulf Coast be given a smaller franchise area than that for which it had applied. When Sadowski's notes were typed by someone with the City, that recommendation was deleted. Moreover, other significant changes were reflected in the typed version of the notes Sadowski had turned over to Earle's messenger: his recommendations that Houston Community Cable, Houston Cable, and Columbia (Westland) be rejected were changed to recommendations that they should continue to be considered; and his statement that Cablecom had presented the only satisfactory application was omitted. Testimony of Robert Sadowski.

Prior to the plaintiff's hearing before City Council on December 12, 1978, McConn suggested to Goldberg that Affiliated seek a franchise in another

[T]he agreements to allocate and divide territory cannot be considered as evidence proving causation of plaintiff's

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area of the City rather than in the area sought by Gulf Coast. McConn testified as to his motivation for the suggestion: "I thought that, in trying to really help Mr. Goldberg, it was pretty obvious to me that Gulf Coast had the muscle and that Mr. Goldberg did not."

At the City Council hearing on plaintiff's application which was conducted on December 12, 1978, the following comments were made by Councilman Goyen:

> Mr. Goldberg, let me address Council's wisdom. As these applications came in, they were sent to the Legal Department. Obviously, a number of lawyers got together and did whatever they did. I was not privy to it nor did I want to sit in on any meeting.
>
> Apparently, they came up with the formula that those applicants agreed upon. I was hoping that your situation might end up in the same pot as the others, whereby there would be some kind of recommendation coming before this Council, and this Council would not have to carve from one to give to another, which we have not had to do in the past and which I do not want to do now nor do I intend to.
>
> I do not want to taketh away and giveth to somebody else, because I haven't had to do that in the past. You have a very competent attorney, and the other people have very competent attorneys. What I would like to see done, and it might take a motion to get this done, is to send this to the Legal Department and try to work something out.

Plaintiff's exhibit 150, at 27-28. Subsequently, the Council discussed how to proceed with plaintiff's application, and Councilman Mann made the following suggestions:

> I want to make a substitute motion that the [plaintiff's] application be referred to the Legal Department, and they in turn can contact these other applicants who have come forward and see if they can work out something.
>
> . . . .
>
> If you take this, fine, then see how much Gulf Coast is going to knock off this other group on farther down and then around and around.
>
> . . . .
>
> Substitute motion that this application be referred to the Legal Department and Public Service, and they are to contact the other people that have ordinances and guarantee that these boundaries are being adjusted between them, and they report back to Council.

Plaintiff's exhibit 150, at 37, 39, 40.

Also at that hearing, Mann indicated his knowledge of a house-count survey that had been conducted by Gulf Coast. Plaintiff's exhibit 150, at 25. The survey resulted in a comparison between the area plaintiff was applying for and an area that was within Houston Cable's application, Plaintiff's

injury, and no other evidence in the record, either direct or inferential, provides the necessary connection between

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exhibit 84, and was conducted in conjunction with a proposal by Gulf Coast, that if Houston Cable would give the identified area to Gulf Coast, then Gulf Coast would be willing to give plaintiff its area. Testimony of Al Levin. A document, prepared sometime between November 28, 1978, and December 20, 1978, by Assistant City Attorney Baer bears an alternative boundary description for the Gulf Coast franchise including the Houston Cable area, with Baer's notation: "I-10 line shifted to Hwy. 290 without Goldberg's tract—contingency." Plaintiff's exhibit 56.

The City Council favored Gulf Coast's franchise, which subsumed the area plaintiff had applied for, and at trial several councilmen and Mayor McConn testified as to their reasons therefor. McConn's concern was to keep politically influential groups content:

> Q You didn't want to step on anybody's political toes, did you?
>
> A Not if I could avoid it.
>
> Q You didn't want to make any type of political decision where some powerful person like Walter Mishcher would be unhappy, did you?
>
> A Not if I could avoid it.
>
> Q And if all of the parties could work things out, then you wouldn't have to make any type of decision, other than approving their agreements, isn't that correct?
>
> A Yes, generally that is correct, yes, sir.
>
> Q And isn't that what you wanted to happen?
>
> A That would have been beautiful, if it could have happened that way.
>
> Q But when it didn't happen and you had to make the choice between Southwest Houston and Gulf Coast, you stated that the other—you thought the other people were more politically powerful than Southwest, isn't that correct?
>
> A Yes, sir. I don't know if I said that, but I'll say it now. Testimony of James McConn.

Councilman Goyen testified by deposition that he would have voted for Affiliated Capital's application if "on the 20th, Mr. Goldberg had come in and Mr. Runnels had come in, Mr. Mishcher had come in, and all the principals had come, and a piece of Houston had been carved out for Mr. Goldberg with no objection by anybody." Councilman Robinson testified that he would have supported Affiliated Capital's application if plaintiff had been able to work something out with Gulf Coast to give him what he wanted. Councilman Westmoreland testified that he did not disagree with his prior deposition testimony that Affiliated had been unable to work out any type of arrangement with Gulf Coast, and for that reason Westmoreland voted in favor of Gulf Coast.

Finally, plaintiff's expert witness, Martin Malarkey, testified at length about the detrimental results of the noncompetitive franchising process in

the second theory of conspiracy to exclude non-conspirators and the plaintiff's failure to receive a franchise.

The testimony elicited by plaintiff from its expert witness further demonstrates that what plaintiff established was a causal relationship between the applicants' agreements to eliminate overlaps in territory and the plaintiff's failure to be awarded a franchise, rather than a relationship between the agreement to exclude non-conspirators and plaintiff's injury.

519 F.Supp. at 1006.

III.

IMPACT ON COMPETITION

It is abundantly clear from the record of this case that a group of Houston businessmen decided to ensure the receipt of cable television franchises by agreeing to divide the city among themselves and exclude anyone who wanted to compete for a franchise on the merits. They did so not simply with the blessing of the Mayor, but at his behest. Record on Appeal, vol. 12, at 450. The devastating competitive impact of this gentlemen's agreement to exclude anyone who wished to compete for a franchise, is evident against the backdrop of the inherent structure of the cable television industry.

Cable television, like electric utilities, is generally considered a natural monopoly. According to conventional wisdom, the extremely high fixed costs incurred in preparing a cable television company for operation prevent the survival of competition in the marketplace. Plaintiff's expert witness on the cable television industry admitted that it did not make economic sense to grant franchises with overlapping boundaries. Record

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Houston, and about the benefits to residents of other cities where the process has involved competition on the merits of the applications. According to his testimony, the benefits include lower rates, provisions for sanctions in the event of noncompliance by the franchisee, provisions for performance bonds, and provisions requiring city approval prior to changes in ownership or control of the franchises. Further, he testified that normally the city itself prepares the franchise ordinance, rather than allowing applicants to do so.

519 F.Supp. at 1000-05 (footnotes omitted).

on Appeal, vol. 35, at 28. The economies of scale do not approach those of electric utilities but the theory for both industries holds that the long-run average costs tend to fall as output increases. We assume for purposes of this discussion that cable television is indeed a natural monopoly and proceed to discuss the pernicious effects of the conspiracy given this assumption.

Defendant Gulf Coast argues that since cable television is a natural monopoly and competition within franchise areas is impractical, the division of territories is a practical characteristic of this industry and was not harmful to consumers. Given this characteristic, competition is possible only before a franchise is granted. Unfortunately for both Affiliated and the citizens of Houston, there was no competition among the corporations that received franchises. The result was lower quality, higher priced cable television for Houston. Record on Appeal, vol. 34, at 23-27.

IV.

THE J.N.O.V. RULING

In *Boeing Co. v. Shipman,* 411 F.2d 365 (5th Cir.1969) (*en banc*), this court established the standard of review of a judgment n.o.v. or directed verdict by a trial court. We stated that:

> On motions for . . . judgment notwithstanding the verdict the Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied.

Id. at 374-75; *accord Bazile v. Bisso Marine Co.*, 606 F.2d 101, 104 (5th Cir.1979), *cert. denied,* 449 U.S. 829, 101 S.Ct. 94, 66 L.Ed.2d 33 (1980).

In weighing the evidence the jury had at its disposal we find that it amply supports the jury's findings in interrogatories Nos. 3 and 5. In no event is the evidence in favor of the defendant so overwhelming that reasonable men could not arrive at the verdict reached by the jury. Thus, the trial court was incorrect in overturning the jury verdict.

In addressing the harm plaintiff suffered as a result of the conspiracy recognized in Interrogatory No. 3, it is important to understand that the agreement to exclude those who wanted to compete constitutes a separate conspiracy and a valid independent ground for imposing liability. While at first glance the answers to Interrogatories Nos. 1 and 3 appear irreconcilable, the explanation is simple. The manner in which Interrogatory No. 1 was posed to the jury caused them to believe that they were passing on the question of whether or not it was better to have one franchise for the city or multiple franchises. All of the parties to the suit agreed that dividing the city into several franchises was preferable and would not unreasonably restrain trade. Indeed, the jury sent a note to the trial judge asking whether or not they needed to answer both questions. They asked: assuming we want to vote "yes on #3 is there any point in voting on #1?" Jury Note No. 4, Record on Appeal, vol., 1, at 1482.

As noted, the trial court believed that the conspiracy found by the jury (Interrogatory No. 3), was not the proximate cause of plaintiff's failure to receive a franchise. The court thus overturned the jury's answer to Interrogatory No. 5. Before addressing this argument directly, we pause to point out that proof of causation in this case is necessarily hypothetical (what would have occurred in the absence of the conspiracy). As the Supreme Court has noted, "[t]he vagaries of the market place usually deny us sure knowledge of what plaintiff's situation would have been in the absence of defendant's antitrust violation." *J. Truett Payne Co. v. Chrysler Motor Corp.*, 451 U.S. 557, 567, 101 S. Ct. 1923, 1930, 68 L.Ed.2d 442 (1981). We

also note that a plaintiff seeking damages for an antitrust injury need only prove with a fair degree of certainty that the defendant's illegal conduct materially contributed to his injury. *Hayes v. Solomon,* 597 F.2d 958, 978 (5th Cir.1979) *cert. denied,* 444 U.S. 1078, 100 S.Ct. 1028, 62 L.Ed.2d 761 (1980); *Terrell v. Household Goods Carriers' Bureau,* 494 F.2d 16, 20 (5th Cir.), *cert. dismissed,* 419 U.S. 987, 95 S.Ct. 246, 42 L.Ed.2d 260 (1974); *Gainsville Utilities Department v. Florida Power & Light Co.,* 573 F.2d 292, 304 (5th Cir.) (noting that a jury charge asking whether or not the violation was a "substantial factor" in plaintiff's loss is a model of perfection), *cert. denied,* 439 U.S. 966, 99 S.Ct. 454, 58 L.Ed.2d 424 (1978). *See Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 1571 n. 9, 23 L.Ed.2d 129 (1969) (in proving fact of damage under § 4 of the Clayton Act it is enough that the violation is shown to be a "material cause" of injury).

When the jury considered Interrogatory No. 3., (which asked whether the defendants conspired to limit competition for cable television franchises), they found that the agreement did consititute an unreasonable restraint of trade. The trial court mistakenly assumed that in determining proximate cause the jury improperly considered evidence pertaining to the boundary agreements submitted in Interrogatory No. 1 and that the evidence plaintiff cites in support of Interrogatory No. 5 is inappropriate because it concerns evidence relating solely to Interrogatory No. 1.

Despite the learned trial court's opinion we find that the judgment n.o.v. was improper because there is substantial evidence and inferences to support the jury's finding that the conspiracy found pursuant to Interrogatory No. 3 was the proximate cause of harm to the plaintiff. We reach this conclusion because three categories of evidence indicate that the conspiracy to limit competition prevented Affiliated from obtaining a franchise: (1) circumstantial evidence flowing from the nature of the conspiracy; (2) evidence that Gulf Coast in conjunction with the City Council vetoed approval of Affili-

ated's application; and (3) evidence that the plaintiff would have been awarded a franchise on the merits in the absence of a conspiracy limiting competition on the merits.

First, Affiliated was the leading rival of Gulf Coast and the other conspirators. The exclusive nature of the conspiracy itself and Affiliated's failure to obtain a franchise is circumstantial evidence from which the jury could infer that the conspiracy operated to exclude Affiliated, a non-conspirator who was very likely to have received a franchise through competition on the merits. In *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969), the Supreme Court held in a trial before the court that it is proper for the trial judge to infer damages from circumstantial evidence. The court noted that "the injury alleged by Zenith was precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause. The trial court was entitled to infer from this circumstantial evidence that the necessary causal relation between the pool's conduct and the claimed damage existed." *Id.* at 125, 89 S.Ct. at 1577 (citing *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 696-701, 82 S.Ct. 1404, 1409-1412, 8 L.Ed.2d 777 (1962)). Failure of a nonconspirator to obtain a franchise is exactly the type of loss that a conspiracy to preclude competition for franchises is likely to cause when the entity awarding franchises participates in the conspiracy.

Moreover, even though the jury found the boundary agreement legal, it could properly consider evidence concerning those agreements as demonstrating the defendant's intent to conspire. *See, e.g., United Mine Workers of America v. Pennington,* 381 U.S. 657, 670 n. 3, 85 S.Ct. 1585, 1593 n. 3, 14 L.Ed.2d 626 (1965); *United States v. Southern Motor Carriers Rate Conference,* 439 F.Supp. 29, 47 (N.D. Ga.1977). This evidence when considered cumulatively with other independent evidence of a conspiracy to exclude anyone who did not join the conspiracy also supports the jury finding of proximate cause. Consequently, the jury's ruling on Interrogatory No. 5 is supported by circumstantial evidence that the conspiracy itself caused Affiliated's injury.

When direct evidence points to a conspiracy to injure the plaintiff, as in the case at bar, a court can find causation on the basis of circumstantial evidence and inference. As this court has noted: "[i]n cases where the defendants' acts are motivated by intent to injure the plaintiff, the inferential leap to the finding of fact of damage is not great. Indeed, one court has found it virtually nonexistent: 'Such damage need not be made patent item by item as on a balance sheet. The mere unlawful combination over a period of time to eliminate competition is proof of damage.' " *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 855 (5th Cir. 1981) (quoting *Fox West Theatres Corp. v. Paradise Theatre Building Corp.*, 264 F.2d 602, 608 (9th Cir.1958)).

Second, the record contains sufficient evidence supporting the inference that co-conspirators prevented Affiliated from obtaining a franchise. The trial court agreed with plaintiff's assessment that Interrogatory No. 3 reflects the jury's "apparent conclusion that the conspiracy to limit competition was an agreement or understanding that franchises would be awarded only to those applicants that were approved by Gulf Coast and other nondefendant participants." 519 F.Supp. at 998. The trial court held, however, that there is no evidence in the record "either direct or inferential, [that] provides the necessary connection between the second theory of conspiracy to exclude non-conspirators and the plaintiff's failure to receive a franchise." 519 F.Supp. at 1006.

We disagree; substantial inferential evidence exists. For example, Affiliated's attorney, Al Levin, testified that when he talked to Assistant City Attorney Adrian Baer in November he was told that "the decision as to who was going to get what areas, specifically in terms of the actual boundaries, were still under negotiations, but the decision as to who was fait accompli." Plaintiff's exhibit No. 151, at 84. When Levin then contacted Gulf Coast's attorney he was told "as far as I am concerned, Al, it's too late; the pie has already been cut." We note that the trial court itself recognized that "[a]n inference can be derived from th[e] testimony [of Al Levin] that the

defendants had decided who would get franchises regardless of what geographic areas the franchises would cover." 519 F. Supp. at 1000 n. 11. In other words, the decision of whom to exclude from the award of franchises did not hinge on the boundary agreements. Under the terms of the conspiracy, applicants who joined the plan obtained a franchise and those who wished to compete for a franchise received nothing.

Direct evidence exists that under the conspiracy, Gulf Coast and the other conspirators, in conjunction with the Mayor and City Council had the power to approve or veto plaintiff's attempt to obtain a franchise. Mayor McConn stated that his vote was subject to the wishes of the conspirators because of their political clout. 519 F.Supp. at 1016. Councilmen Goyen, Robinson, and Westmoreland testified that they would have voted to grant Affiliated a franchise if Gulf Coast and the other applicants had given their blessing. 519 F.Supp. at 1004. After hearing Affiliated's presentation at a City Council meeting on December 12, 1978, two Councilmen encouraged the City Legal Department and the applicants to "see if [you] can work out something." A document prepared by the City between November 28, 1978, and December 20, 1978, provided for changed boundaries, noting that "I-10 line shifted to Hwy. 290 without Goldberg's tract—contingency." Plaintiff's exhibit 56. The record evidence reveals that this alternative was contingent upon the approval of Gulf Coast and the other conspirators. Reasonable men could certainly have drawn the inference that Affiliated's application was denied because Gulf Coast and the other participants in the conspiracy vetoed its application.

Third, the record contains evidence that absent a conspiracy, Affiliated would have obtained a franchise on the merits of its application. Citing Malarkey's testimony, the trial court held that all of the applications, including plaintiffs, were "well below standard and not all informative as to many important aspects of the franchise application." 519 F.Supp. at 1009. Although this conclusion is debatable, there can be little doubt that Affiliated was more qualified to receive a franchise than

the five successful applicants. Moreover, the evidence demonstrates, so the jury could infer, that Affiliated would have received a franchise if the conspiracy had not prevented a consideration of its application on the merits. Malarkey testified that the most important part of a franchise application concerns a firm's financial qualifications. He testified that Affiliated's application was the only one that contained enough financial information to have permitted the City Council to make a preliminary decision as to its ability to construct a cable system. He stated that Affiliated was financially qualified and that Gulf Coast was not. The last audited financial statements contained in Affiliated's application reveal that it had assets of $25,294,266 and equity of $18,622,383. Plaintiff's exhibit 83. Gulf Coast, on the other hand, had assets of $366,259 and equity of $327,259. Plaintiff's exhibit 10. Moreover, by 1980 many of the conspirators had been bought out by out of town corporations and Gulf Coast had borrowed half of its debt from another company. Plaintiff's exhibit 55, at part II, § 1. Affiliated, on the other hand, had the qualifications of close ties to the community it sought to serve and the capacity to provide immediate service. We find that the jury could properly infer from the preceding evidence that Affiliated would have obtained a franchise if the conspiracy to exclude nonconspirators had not eclipsed competition on the merits.

V.

NOERR-PENNINGTON DOCTRINE

The *Noerr-Pennington* doctrine provides an exception to antitrust liability enabling citizens or business entities to influence or to petition public officials to take official action that will harm or eliminate competition. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). When such petitioning is a mere sham or the public officials are participants in the conspiracy, however, there is no exception to antitrust liability. The trial court instructed the

jury fully and correctly with regard to the *Noerr-Pennington* doctrine,[6] the State Action Exemption, and Legislative Process Immunity.

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6. Indeed, if the instruction was anything but neutral it was favorable to the defendants. It provided:

Defendant Gulf Coast claims that the agreements with Houston Cable and Westland to divide or allocate territories within which certain applicants would apply for a franchise constituted an excercise of Gulf Coast's right to petition government and therefore falls outside the scope of the Sherman Act. The Constitution ensures the right of all persons, whether acting individually or in concert, to petition government for political action, recognizing that persons in the exercise of these constitutional rights naturally will petition government for political action that is favorable to their particular interests and unfavorable to the interests of others. The Supreme Court has declared that this right to petition government for political action is paramount, and that the concerted effort of various parties genuinely to influence public officials does not in any way violate the antitrust laws regardless of intent or purpose. Joint efforts truly intended to influence public officials to take official action do not violate antitrust laws even though the efforts are intended to eliminate competition, unless one or more of the public officials involved was also a participant in the illegal arrangement or conspiracy.

Accordingly, you must determine whether any City official participated in the alleged conspiracy, as that term is defined in this Charge. You may not infer that any member of the City Council or the Mayor was participating in or acting in furtherance of a conspiracy simply because that person accepted or agreed with a position urged by an applicant. A public official's communications with a constituent, even if that official thereby is influenced to favor the constituent, is within the parameters of the legislative process, and cannot violate the antitrust laws so long as the officials' activities are not the product of an illegal arrangement.

Also you must determine whether the petitioning activities of the defendants Gulf Coast, Clive Runnels or Jack Trotter were genuine attempts to influence public officials with regard to political action.

The petitioning activity must be genuine. Protection does not extend to purported petitioning that is in fact a mere sham to cover what actually is nothing more than an attempt to interfere directly with the business of a competitor. That is, protection does not extend to activities that are merely a pretext for inflicting on plaintiff an injury not caused by any government action.

Thus, if you should conclude from your review of the evidence that defendants City of Houston and Mayor McConn did not participate in any

In its answer to Interrogatory No. 3 the jury found a conspiracy and implicitly found that the defendants were not entitled to immunity. In analyzing the jury's ruling the trial court produced an exhaustive study of why the public co-conspirator exception to the *Noerr-Pennington* doctrine was applicable to the instant case. The district court's analysis of this issue and the record evidence is thorough and correct. 519 F.Supp. at 1016-23. Therefore, we need not recount his analysis and reasoning. Numerous examples of official involvement in the conspiracy abound, which indicate that the trial court did not err in finding that the co-conspirator exception applied. For example, the City fired its own expert when he wrote a report unfavorable to Gulf Coast, and then it doctored his report. We agree with the trial court's assessment that the actions of the Mayor and City Council indicate a "vigorous involvement in orchestrating certain aspects of the conspiracy." Thus, its application of the co-conspirator exception was correct.

Since the trial court found the co-conspirator exception applicable it did not discuss the sham exception. We note that a

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illegal agreement or conspiracy and that defendants Gulf Coast, Runnells and Trotter did nothing more in his case than meet with other franchise applicants and with City officials for the purpose of persuading the City to award them a cable television franchise on some basis, and in furtherance of that objective they reached boundary agreements with the Houston Cable and Westland groups, then you may not find that these defendants violated the antitrust laws. Even if you believe that the purpose or the necessary effect of meetings attended by Gulf Coast or its representatives was to exclude plaintiff from obtaining a franchise, you may not find that the defendants were guilty of a conspiracy in restraint of trade if you believe that the defendants' conduct genuinely was aimed toward influencing the City to take favorable action toward them in granting a franchise. On the other hand, if you find that the activity was not really an attempt to influence an official to take official action, but was nothing more than a sham—an attempt to interfere directly with the business of a competitor, you may consider those actions and any reasonable inferences you may draw from those actions in determining whether defendants engaged in a conspiracy in violation of the antitrust laws.

The burden of proof with regard to this instruction is on the defendants. They must prove by a preponderance of the credible evidence that the petitioning activities were genuine.

defendant cannot rely on *Noerr-Pennington* immunity when the activity to influence government action is a mere sham to hide what is essentially an attempt to interfere with a competitor's business. *Eastern R.R. President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144, 81 S.Ct. 523, 533, 5 L.Ed.2d 464 (1961). Petitioning calculated to deny a competitor meaningful access to a governmental entity is within the sham exception to *Noerr-Pennington* immunity. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 512, 92 S.Ct. 609, 612, 30 L.Ed.2d 642 (1972); *Mason City Center Ass'n v. City of Mason City*, 468 F.Supp. 737, 745 (N.D. Iowa 1979). Whether or not such conduct is within the sham exception is a fact issue for the jury. *Feminist Women's Health Center v. Mohammad*, 586 F.2d 530, 543 (5th Cir.1978), *cert. denied*, 444 U.S. 924, 100 S.Ct. 262, 62 L.Ed.2d 180 (1979).

Appellee argues that Affiliated was not denied access to the City Council but had an opportunity to present its application formally and informally. Appellee questions the applicability of *California Motor Transport, supra* (where the defendant used frivolous lawsuits to deny a competitor access to a court or agency), in the legislative context of a city council awarding franchises. *See* 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 203 (1978). We need not reach this disputed issue because the defendants' activities were clearly within the co-conspirator exception as the jury implicitly found in its answer to Interrogatory No. 3. We note in passing, however, that the record may indeed contain enough evidence to justify application of the doctrine. While in the process of trying to obtain a franchise, Affiliated's attorney was told by Gulf Coast's attorney that the political realities were that "(t)he city is locked up by five franchises." Record on Appeal, vol. 22, at 34. This and similar evidence of the activities of McConn, the City Council and the other co-conspirators may have effectively blocked meaningful access to a fair and impartial consideration of Affiliated's application by the city such that the sham exception applies.

VI.

THE MAYOR'S IMMUNITY

Appellee McConn argues that he is entitled to absolute, or in the alternative, qualified immunity. This circuit and others have recognized that a municipal official acting in his legislative capacity is entitled to absolute immunity from civil suits. *E.g., Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir.1981), *cert. denied*, 455 U.S. 901, 102 S.Ct. 1242, 71 L.Ed.2d 440 (1982); *Bruce v. Riddle*, 631 F.2d 272 (4th Cir.1980); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir.1980).

In *Hernandez*, we held that local legislators are entitled to absolute immunity for conduct in furtherance of their duties. We also recognized that although a Mayor is the Chief Executive Officer of a city, "he is entitled to absolute immunity from suit for acts taken in a legislative capacity." 643 F.2d at 1193 (citing *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 731-34, 100 S.Ct. 1967, 1974-76, 64 L.Ed.2d 641 (1980).

Although the Mayor of Houston serves in the traditional executive role, he also presides over and has a vote in the City Council, which functions as a legislative body. McConn contends that his activities connected with the award of the cable franchises were "more closely akin to that of a legislator than an executive." Since we find that McConn is entitled to qualified immunity we need not reach the question of his absolute immunity. We note in passing, however, that on the facts before us it is unlikely that he is entitled to absolute immunity.[7]

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7. "[T]he Supreme Court has long held that no immunity exists for actions outside the sphere of legitimate legislative activity." *Espanola Way Corp. v. Meyerson*, 690 F.2d 827, 829 (11th Cir. 1982), *cert. denied*, 460 U.S. 1039, 103 S.Ct. 1431, 75 L.Ed.2d 791 (1983). Although McConn's votes at the City Council meetings and some of his other activities were part of the legislative process, he also undertook substantial acts outside of his legislative capacity, which were neither legitimate nor in furtherance of his legisla-

The trial court's interpretation regarding qualified immunity is inapplicable now because the court did not have the benefit of the Supreme Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). In *Harlow* the Court announced that the question of qualified or good faith immunity for public officials is to be determined under an objective standard. The court held that:

> government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly es-

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tive duties. Mayor McConn participated in and promoted all illegal conspiracy, and intervened several times to apply pressure on Affiliated and the conspirators, doing so outside of his legislative capacity.

The Mayor testified that the franchise process was conducted in an open, public forum. The Public Service Department prepared a questionnaire for all applicants and hired a consultant to evaluate the applications. The public was thus lead to believe that there would be competition on the merits for the franchises, even if the competitors drew the particular boundary lines. The city's expert criticized the application process, determined that only two applicants were qualified, and that three applicants, including Westland, should be rejected.

The Mayor did not adhere to the publicly announced program of granting franchises on the basis of critical evaluation. Instead, the franchise ordinance was drafted by the conspirators, the expert was fired, his report doctored, and the City Council's decision was made solely on the basis of who participated in the conspiracy.

The Mayor did not publicly reveal that to repay a personal debt he had intervened to guarantee a franchise for his lawyer. He never announced that the city's expert had been fired because his recommendations were contrary to the design of the conspiracy. He did not inform the public that the expert's report had been altered to make the conspirators' applications appear qualified and meritorious. He never admitted that the information in the applications was not a factor in the decision-making process. These facts and others belie the contention that the Mayor's acts were part of a legitimate legislative process. As Judge Bue noted, the City was "vigorous[ly] involve[d] in orchestrating certain aspects of the conspiracy" and the Mayor "directed" some of the activities of the conspirators as "an active co-conspirator not content merely to accede to the wishes of private parties." 519 F.Supp. at 1014, 1016. The illegitimate nature of the Mayor's actions explains why the jury found Runnels (Gulf Coast's attorney) and Trotter (financier) innocent, yet held McConn guilty—despite a generous *Noerr-Pennington* instruction.

> tablished statutory or constitutional rights of which a reasonable person would have known.

457 U.S. at 818, 102 S.Ct. at 2738. Assuming that the law in question was clearly established, an official can still prevail if he can show "extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard." *Id.* at 819, 102 S.Ct. at 2739.

McConn contends that the state of the law regarding a municipal official's liability for an antitrust violation was unsettled in 1978. Since he could not have known that he would be liable for violating the antitrust law, he argues that he is entitled to qualified immunity.

We take note of the fact that at the time the franchises were granted it was unclear whether or not an antitrust violation occurred under the rule of reason when a city let franchises in an uncompetitive manner. Second, it was uncertain whether or not home rule cities were entitled to *Parker* immunity. *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). There were several recent cases indicating that a city or political subdivision of a state could not use *Parker* immunity to avoid the antitrust laws without a state mandate to displace competition. *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978) (decided March 29); *Whitworth v. Perkins*, 559 F.2d 378, 381 (5th Cir.1977), *judgment vacated*, 435 U.S. 992, 98 S.Ct. 1642, 56 L.Ed.2d 81 (1978), *judgment reinstated*, 576 F.2d 696 (1978) (decided July 17) (per curiam); *Kurek v. Pleasure Driveway and Park District of Peoria*, 557 F.2d 580 (7th Cir.1977), *judgment vacated*, 435 U.S. 992, 98 S.Ct. 1642, 56 L.Ed.2d 81 (1978), *judgment reinstated*, 574 F.2d 892 (7th Cir.1978) (decided Sept. 18) (per curiam), *cert. denied*, 439 U.S. 1090, 99 S.Ct. 873, 59 L.Ed.2d 57 (1979); *Woolen v. Surtran Taxicabs, Inc.*, 461 F.Supp. 1025, 1029 (N.D.Tex.1978) (decided Nov. 29); *United States v. Texas State Bd. of Public Accountancy*, 464 F.Supp. 400, 403-04 (W.D.Tex.1978) (decided May 5), *modified on other grounds*, 592 F.2d 919, *cert. denied*, 444 U.S. 925, 100 S.Ct. 262, 62

L.Ed.2d. 180 (1979); *Star Lines, Ltd. v. Puerto Rico Maritime Shipping Auth.*, 451 F.Supp. 157, 166 (S.D.N.Y.1978) (decided May 3). *Contra Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir.1975).

The cases indicating liability, decided as or shortly before the franchise process occurred,[8] were breaking new ground and were not clearly established. Moreover, the guidance from the Supreme Court was limited because *Lafayette* was a plurality opinion. *See Hybud Equip. v. City of Akron*, 654 F.2d 1187, 1195 (6th Cir.1981), *judgment vacated*, 455 U.S. 931, 102 S.Ct. 1416, 71 L.Ed.2d 640 (1982). It was not until *Community Communications Co. v. Boulder*, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982), that it became clearly established that a home rule city was not entitled to blanket *Parker* immunity and could thus be liable for violating antitrust law. Consequently, the mayor could not, nor should not, have known that he was violating a clearly established law.

Although we find that the Mayor can avail himself of qualified immunity, we emphasize that this ruling does not effect his status as a conspirator. The jury found that the Mayor was a conspirator and we do not disturb this finding. The Mayor is absolved of liability only because applying the *Harlow* immunity standard he did not, as a matter of law, violate a clearly established law.

At oral argument McConn's attorney opined that municipal politics are municipal politics and that the appropriate remedy for the Mayor's acts was exercised by the voters of Houston when they booted McConn out of office. *See Tenney v. Brandhove*, 341 U.S. 367, 378, 71 S.Ct. 783, 789, 95 L.Ed.2d 1019. Certainly currying political favor is the hallmark of a

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8. In July and August of 1978, Houston began taking applications for franchises. In October the city hired an expert and in November the plaintiff applied for a franchise. On November 29, 1978, the city ordinances were tabled and the plaintiff was granted a hearing on its application. On December 12, 1978, the plaintiff made its presentation and all applications were thereafter referred to the Public Service Department for evaluation. On January 10, 1979, the final franchises were awarded.

good politician and is neither illegal nor violative of the antitrust law. Nevertheless, in future cases involving franchise letting, when an elected official instigates, directs, or actively participates in an illegal conspiracy designed to circumvent competition on the merits—when the state has not provided the city with an anticompetitive mandate—a reasonable man should know that such actions violate clearly established antitrust law.

Judgment n.o.v. should not have been granted and the court below is hereby REVERSED with instructions to reinstate the jury verdict and grant the plaintiff judgment against Gulf Coast only.

PATRICK E. HIGGINBOTHAM, *Circuit Judge*, concurring specially:

I

To understand the limits of our holding it is important that we isolate the conduct found illegal. The jury's answer to interrogatory number one tells us that the conspiracy in unreasonable restraint found in number three *did not* include "agreements on boundary lines so as to divide the geographic areas for which these applicants would seek cable television franchises." On the evidence, reconciliation of the answers to interrogatories one and three requires the conclusion that the jury found that the city and the private defendants agreed that Affiliated's application would not be considered—that the city would not consider an application from companies not approved by the original five applicants for franchises. The jury could thus have concluded that the principal purpose of the concerted activity was not to influence public officials or to further any proffered goal of the city other than that of blocking competitive access. Reconciliation of the jury's answers leaves little room for any conclusion that the jury decided otherwise.

The point here is more than whether evidence supports the jury verdict. The relevant point is that the *only* conduct condemned today is an agreement between the city and private defendants to deny a competitor access to the process created by the city for the awarding of franchises. The majority opinion does not otherwise judge the legality of the process. The holding today is then relatively straightforward in its condemnation of a classic restraint and the antitrust rule for municipalities which emerges is a modest one indeed.

Equally, our decision should not be read to imply that a municipality must employ competitive bidding in the award of all contracts and franchises or the procurement of all goods and services. Such a conclusion would be inferable only if we were to hold that the public interest in competition must predominate over other legitimate municipal interests as it predominates over the private profit motive. Emphatically, we have not so held.

The municipal defendants have stated that they intended to favor minority businesses and locally-based businesses, but, even assuming that both of these are legitimate public purposes, neither policy explains the selection of the Gulf Coast consortium in preference to Affiliated. These defendants have also testified that they hoped to avoid the burden of selecting between competing applicants for particular franchise areas, and only the Gulf Coast group presented a package proposal featuring total city coverage with no overlapping boundaries. Selecting from among competing applicants those companies most fit to provide cable service to the citizens of Houston was a paradigmatic governmental function, and it is difficult to conclude that the desire of the mayor and city council to escape making this determination was itself a legitimate municipal purpose.[1] As the municipal defendants have thus failed to

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1. Regardless, the jury could have inferred from the evidence that the city and the defendant applicants agree that no other applicant would be considered without their permission. It is difficult to defend action as being that of city government, with all the weight such ought to carry, when the decisionmaking is placed in the hands of private potential competitors.

advance any public policy justifying their conduct, I conclude that the jury was warranted in concluding that their anticompetitive actions merit the imposition of antitrust liability.

II

Isolating the restraint which we today condemn also places in perspective the limits of our rulings regarding First Amendment protections of petitions for redress. The *Parker* principle stunted the growth of *Noerr-Pennington* until *City of Lafayette* and *City of Boulder* were decided. The full reach of *Noerr-Pennington* by necessity is now open for exploration. But today we do no exploring. In the present posture of this case there is no petition to government at issue. We do not face a successful request for governmental action with anticompetitive results where the participation of government was confined to that of decisionmaker. Instead, the condemned conduct included active participation by the city with citizens in the exclusion of a competitor. Resolution of the host of difficult issues traveling under the *Noerr-Pennington* rubric must await another day.

In sum, I concur with Judge Garza's opinion and add this separate writing in parts I and II only to identify issues we do not decide today. I continue in part III to highlight an issue presented by the application of antitrust laws to municipalities and implicit in today's decision.

III

The Supreme Court in *City of Lafayette* and *City of Boulder* left the inferior courts with the exquisite task of fitting the antitrust laws to municipal government. The rule of reason is at the center of the uncertainty.

Basic antitrust principles teach that private citizens and corporations cannot weigh the public good against the competitive impact of their agreements.[2] It is, for example, no

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2. Given the procedural posture of this case, the parties do not attack the jury instruction regarding rule of reason. Regardless, how the rule is actually applied gives it meaning apart from its traditional phrasing.

answer to price-fixing charges that competitive letting of design work will cause inferior design. It is for government to weigh the public good against any anticompetitive impact. When the antitrust laws are then found to be applicable to municipalities, how we may balance the competitive impact of decisions by city government against the perception of the public good is uncertain.

This question is posed when city government acts in its unique role of local government, whatever be the issue when it acts as a consumer of goods and services. Arguably, when the city enters the marketplace to compete for the custom of others, or to purchase window cleaners for the City Hall windows, its activity is virtually indistinguishable from private business. Where, however, the city acts as a regulator or governor of the sales and deliveries of goods and services to its constituents, it is engaged in a role dissimilar from that of private business.

In our economic system, private business enterprises are presumed to respond predominately, if not exclusively, to the profit motive. By contrast, the concept of "profit" *per se* is alien to the purposes of a unit of government. Consequently, the clash of interests necessitating an antitrust law—the private desire to reap extra-normal profits versus the public interest in free competition will not appear in its traditional form when the accused antitrust conspirator is a governmental entity.

The underlying principle of the antitrust laws, starkly stated, is that when the private pursuit of profit conflicts with the public interest in competition, the public interest shall prevail. In turn, the traditional "rule of reason" states that a present constraint on competition may be justified only by an ultimately pre-competitive effect. Other societal benefits which may allegedly flow from an anticompetitive act are irrelevant because it is not the businessman's prerogative to determine how those benefits may best be obtained. Rather, we presume that competition will ordinarily be attended by greater social benefits than any other market structure. It is then the prerogative of government alone to determine when the competitive process is inadequate to meet the needs or the best interests of

society. In such cases, the government may pursue three related and often-overlapping courses: It may replace or restrict competition, for example by adopting a licensing procedure; it may supplement competition, for example by enacting product safety or anti-pollution laws; and it may substitute for competition, for example by regulating the price charged by a natural monopolist.

Though the majority has not addressed this issue directly, its opinion signifies amenability to the rationale that the "rule of reason" which applies when the accused is a governmental entity must differ from that encountered when the accused is a private business. This is so because the majority opinion ultimately rests on a duty of the city to justify the absence of competition in awarding franchises; political patronage is not justification. Under this rationale, public interests other than competition can be balanced against the interest in competition, because it is the particular prerogative of government to advance these other interests. Thus, for example, there was evidence in this case that the City of Houston planned to favor minority-owned businesses in awarding the cable franchises. Such a policy is anti-competitive in that it accords an advantage to certain businesses based on a non-economic criterion, but no antitrust liability should result if one decides that the advancing of public policy is "legitimate" and outweighs any adverse impact on competition.

The majority does not surface the problem, but, by analogy to other uses of private suits to implement social goals, such a rationale ought to be implemented by allocating to the party best equipped to make the proof the burden of going forward with the evidence. Thus, when a plaintiff has established a prima facie case of anticompetitive conduct by a municipal defendant, the burden on the municipality would then be to articulate legitimate governmental interests advanced by its conduct which put at issue whether the gains reasonably expected to be achieved by its anticompetitive conduct justify the degree by which competition was reasonably expected to be diminished. The ultimate burden of persuasion that the re-

straint, so measured, was unreasonable, would be on the plaintiff.

Application of such a rule will not be easy. Critically, such a rule does not reconcile applicability of the federal antitrust laws to municipalities with those principles of federalism which counsel deference to the balancing of public interests performed by local units of government under authority delegated by the states. To the contrary, it would give to the courts the task of balancing a municipal objective against its anticompetitive effect. Reviewing the "reasonableness" of such restraint could travel against our commitment to federalism.

A rule of reason analysis that allows government purpose to be directly weighed against competitive impact seems antithetical to federalism. Yet, the premise of this concern is that decisions by municipal government reflect a species of governmental choice and that such review is an intrusion of the federal government into the affairs of local government. This premise, however, fails to accept that in this sense the majority opinion in *City of Boulder* denied the sovereignty of municipal government (we are not a nation of city states). In doing so, the court sanctioned this intrusion into free decision-making in a manner not dissimilar to limitations placed upon private business.

Finally, not to weigh the purpose of the restraint and the presence of less anticompetitive alternatives to achieving the purpose would render the rule of reason illusory, for its essence is balance. In sum, the weighty concerns about subjecting decisions of municipal government to traditional rule of reason measures were presumably considered and found insufficient to overcome the pro-competitive policies underlying the antitrust laws when the Supreme Court removed municipalities from the cover of *Parker v. Brown*. While in my view this is a treacherous path, as an inferior court we must accept that judgment and I read the majority opinion as doing so.

CLARK, *Chief Judge*, with whom REAVLEY and E. GRADY JOLLY, *Circuit Judges*, join, dissenting in part.

This case came to be reheard en blanc because the panel held that the City of Houston, its mayor and a cable franchise applicant committed a *per se* violation of Section 1 of the Sherman Act. The en blanc court abandons that position. Although the reasoning it substitutes lacks the sweep of the prior error, it remains just as wrong in reversing the district court's judgment in favor of Gulf Coast.

Initially, the majority fails to make the critical determination of relevant market. It compounds this legal error by choosing its own path through the facts to arrive at a result which ignores the contrary initial fact finding of the jury and the trial judge's fact reconciliation of the jury's two inconsistent findings. The result is to saddle a bidder for a municipal franchise with an erroneous 6.3 million dollar award for actions that are no more an antitrust offense than would be an agreement to establish separate churches in different parts of town.

Relevant Market—The majority acknowledges that the city started this unfortunate affair when it made a political decision to let multiple franchises for cable TV coverage in Houston. What the majority then promptly ignores is that this final decision established the relevant market for each competitor as, not the city of Houston, but each discrete segment of the city that any competitor for a franchise wanted to designate. This elemental truth negates every anticompetitive conclusion the majority draws. When the proper concept of relevant market is put with the jury finding that there was no conspiracy in restraint of trade in the agreements which drew the proposed boundary lines, every doubt that this is not an antitrust case disappears. Affiliated Capital could have competed in any one or more of the relevant markets designated by an applicant in the defendant group. Affiliated Capital could have competed in yet different markets by forming its own group and dividing territories differently. When it belatedly demanded a choice piece of Gulf Coast's territory, the rebuff was neither conspiratorial nor anticompetitive.

Inconsistent Special Verdicts—The jury determined that the boundary line agreement to divide geographic areas between franchise applicants was not part of a conspiracy in unreasonable restraint of trade. This finding is a lion in the street for the majority's fact conclusions on causation. This jury fact finding was not a casual aside. The plaintiff insisted this was a major fact issue in the case. The court's instructions as well as its interrogatories made it so. How does the majority harmonize this critical, well supported finding which the trial judge who heard and saw the witnesses found controlling? It recasts the jury's first special verdict—which found the boundary agreements were not part of a conspiracy in unreasonable restraint of trade—as a finding that multiple franchises were preferable to one.

The majority's forced reconciliation of the jury's answers to interrogatories 1 and 3 is no reconciliation at all. It merely substitutes this court's finding for that of the jury. The only reasoned path to resolution of the case through reconciliation of the jury's otherwise inconsistent answers is that followed by the trial court—to grant judgment for the defendants on the basis of no causation.

Alternatively, conceding for the sake of argument that there could be some basis for finding causation of damage to plaintiff in a conspiratorial refusal by Gulf Coast to remake a valid boundary agreement, the decision of this court should be that the jury's answers to interrogatories were internally inconsistent and that a new trial is required. *Guidry v. Kem M'f'g Co.*, 598 F.2d 402 (5th Cir.1979); Wright and Miller Federal Practice and Procedure Civil § 2510. But the majority enters its own verdict on inconsistent findings remade at the appellate level. This is wrong.

Lack of Antitrust Injury—Still more wrong is the court's approval of the use of the Sherman Act in this dispute to wound one who competed on the city's terms and reward a summer soldier who did not. The antitrust laws were not intended to restore losses caused by business mistakes or free market forces. Affiliated Capital, for reasons of its own, did

not seek a cable TV franchise until others interested had legally agreed on market areas. That default is the sole proximate cause of its failure to get a franchise.

I concur in the result reached in Part VI of the majority opinion as to the mayor's qualified immunity. I also agree with the view expressed in Judge Higginbotham's concurring opinion that the majority's decision should not be read as a ruling that cities must use competitive bidding to award contracts and franchises. Such a ruling would drastically impede the development of a law of municipal antitrust liability which accords proper deference to municipal decision-making.

I respectfully dissent from the partial reversal of the judgment.

In the

United States Court of Appeals

For the Fifth Circuit

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700 F.2d 226 (1983), No. 81-2335.

AFFILIATED CAPITAL CORPORATION, etc.,
Plaintiff-Appellant,

v.

CITY OF HOUSTON, et al.,
Defendants,

Gulf Coast Cable Television and
James J. McConn,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas.

March 17, 1983.

Before CLARK, *Chief Judge*, GEE and GARZA, *Circuit Judges.*

GARZA, *Circuit Judge*:

The district court's grant of judgment *non obstante veredicto* caused the plaintiff to initiate this appeal. After a thorough consideration of the record, we find the territorial market division involved in this case to be a *per se* violation of the Sherman Act, 15 U.S.C. § 1. We, therefore, reverse the lower court judgment and reinstate the jury's award of $2,100,000 damages.

FACTS

The events which culminated in this litigation were played out in Houston, Texas, where in 1978, cable television franchises were awarded. This was not the first time that cable television for the city of Houston had been discussed. Six years earlier, the city had sought applicants for cable television franchises. In 1972, several firms submitted applications and, following the review of these applications by the Public Service and Legal Departments, two were recommended to the Mayor and City Council. The vote of Mayor and City Council determined that a franchise for the entire city be awarded to one corporation.

The unsuccessful franchise applicant, Gulf Coast Cable Television Co. [hereinafter Gulf Coast], thereafter secured a petition of more than five hundred Houston voters calling for a referendum on the Council action.[1] When put to a vote of the populace of the city, the "monopoly" franchise was soundly defeated.

The Mayor of Houston in 1978 had been a city councilman in 1973, and accordingly, was anxious to avoid a repeat of the problems encountered. The Mayor testified at the trial below that he, therefore, determined that a number of franchises would be granted instead of the monopoly approved in 1973. Additionally, he resolved that, where qualified, local applicants would be favored. Finally, he concluded that minority participation should be permitted. Unfortunately, the Mayor did not stop there at his manipulation of the cable television franchising process.

Defendant Gulf Coast was the first of many concerns to seek a cable television franchise in 1978.[2] There is ample evidence

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1. Tex.Rev.Civ.Stat.Ann. art. 1181 (Vernon 1963) and the Charter of the city of Houston provided for this procedure.

2. Gulf Coast is a limited partnership which operates solely in the cable television business. After its unsuccessful bid for a franchise in the city of Houston in 1972, Gulf Coast remained in business and obtained franchises for a number of the small cities that lie within the Houston metropolitan area.

that the city of Houston did not even initiate the franchise process; defendant Gulf Coast approached the city and made application for a franchise. This action served as the commencement of a very unusual process. The city of Houston must be characterized as a highly desirable market for cable television. The city, however, made no effort to take advantage of this fact by broadcasting, via trade publication or otherwise, its intention to award franchises. Instead of following this common practice, the city simply passively accepted applications as they arrived. From the many applications which were submitted to the Public Service Department, four emerged as strong contenders based not on the strength of their proposals, but rather the political strength of the men behind them. These four actors were Gulf Coast, Houston Cable Television Co., Houston Community Cable Television Co., and Meca. Mayor McConn had let it be known that he did not want to choose between competing applicants. He wanted the applicants to work together, resolve any overlaps in their territories and present him with a finished product. He abdicated his responsibility in the franchising process to a group of powerful Houston businessmen. In turn, these businessmen became "friendly competitors" in an effort to segment the city among themselves and prevent any outsiders from competing with them.

These businessmen and their attorneys met, and over a period of time arrived at mutually agreeable franchise areas. The Mayor reentered upon the scene at this juncture, however, and informed Gulf Coast that another applicant must be added to the ranks. Westland Corporation, a group controlled in large part by the Mayor's personal attorney, must be given a franchise. The area involved was a portion of the territory sought by Gulf Coast. Conscious of both the political realities of the situation and the need to avoid competition among potential franchises, Gulf Coast decided to redraw the franchise boundaries in order to comply with McConn's wishes. Now the businessmen were prepared to meet to present a *fait accompli* to the Mayor and City Council.

While Gulf Coast and the above-mentioned applicants were cutting out competition by cutting up the city among them-

selves, the plaintiff, Affiliated Capital Corporation [hereinafter Affiliated] entered the picture. Affiliated is a publicly-held corporation that owned a savings and loan association. A federal prohibition against owning both savings and loan associations and cable television systems prevented Affiliated from making application for a franchise until it sold the savings and loan association. After the mid-September sale, Affiliated hired a local attorney to check into the status of the franchising process. When the attorney contacted counsel for Gulf Coast, he was informed that Affiliated was too late because the "pie had been cut." Amazed by this news, Affiliated's president, Billy Goldberg, went to visit the Mayor, who assured him that there was still time for Affiliated to receive a fair hearing. Consequently, Affiliated made application for a cable television franchise on October 16th.

Although the city never advertised its intention to award cable television franchises, it did take several other measures during this period calculated to give the appearance that the citizens of Houston would receive quality cable television service. The Public Service Department prepared a questionnaire which was distributed to all franchise applicants. The city hired a consultant, Dr. Robert Sadowski, to evaluate the applicants based on their responses to this questionnaire. By the middle of November, Dr. Sadowski had completed a report which was highly critical of the manner in which the franchising process was being handled. He declared that it was not rational to allow the applicants themselves to divide the city into franchise territories. He concluded that this was not a procedure designed to give the citizens of Houston the best possible cable television service.

In addition to this general indictment of the process, Dr. Sadowski recommended that only two of the applicants, Meca and Cable-Com, be awarded the franchise areas they sought.[3] He urged that three applicants, Houston Cable, Westland, and

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3. Doctor Sadowski never evaluated the application submitted by Affiliated for this report. It was submitted after the termination of his employment.

Houston Community Cable, be rejected and that the size of defendant Gulf Coast's service area be substantially reduced. He apparently had doubts about the ability of Gulf Coast to service even this smaller territory so he made a personal visit to its facility. Shortly after this visit, Sadowski was fired. His conclusions were altered before the report was made public. The five ultimately successful applicants were pronounced qualified.[4]

The City Council was now prepared to take final action on the cable television franchise applications. The president of Affiliated appeared before City Council and requested that his application be given due consideration. Instead of due consideration, Council, through Councilman Johnny Goyen, offered the advice that Affiliated should go and work out an agreement with defendant and the other above-mentioned applicants.

> Mr. Goldberg, let me address Council's wisdom. As these applications came in, they were sent to the Legal Department. Obviously, a number of lawyers got together and did whatever they did. I was not privy to it nor did I want to sit in on any meeting.
>
> Apparently, they came up with the formula that those applicants agreed upon. I was hoping that your situation might end up in the same pot as the others, whereby there would be some kind of recommendation coming before this Council, and this Council would not have to carve from one to give to another, which we have not had to do in the past and which I do not want to do now nor do I intend to.

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4. Shortly before the franchise ordinances were considered by City Council, the Public Service Director submitted a letter to the City Attorney to the effect that he lacked the information necessary to judge the merits of each application. In relevant part, the letter concluded that "[w]hile these issues may have been considered by the drafting principals, and may have been addressed satisfactorily by them, I have no way of knowing this." Record on Appeal, vol. 14, at 616. The "drafting principals" were later identified as the attorneys for certain franchise applicants.

> I do not want to taketh away and giveth to somebody else, because I haven't had to do that in the past. You have a very competent attorney, and the other people have very competent attorneys. What I would like to see done, and it might take a motion to get this done, is to send this to the Legal Department and try to work something out.

Plaintiff's Exhibit 150 at 27-28.

The message to Goldberg was clear: it was not the Council, but rather private businessmen who would decide the future of cable television in Houston. When Mr. Goldberg did not make an agreement with those businessmen, the City Council and Mayor voted for the convenient franchise package with which they were presented by Gulf Coast. This action led Affiliated to the federal courthouse with the allegation that defendants had engaged in a conspiracy to prohibit its entry into the Houston cable television market, thereby violating section 1 of the Sherman Act. Specifically, the plaintiff claimed that certain applicants for cable television franchises agreed to define the territories in which they would apply for franchises, so that no two members of the conspiracy would compete for the same territory. In addition, plaintiff charged defendants with participation in a more general conspiracy to limit competition for cable television franchises by excluding non-conspirator competitors.

DISTRICT COURT JUDGMENT

At the close of evidence in the trial of the instant case, the jury was presented with a series of interrogatories. The relevant interrogatories, as well as the jury responses thereto, are reproduced below.

INTERROGATORY NO. 1

> It is established that two or more franchise applicants, including defendant Gulf Coast, participated in agreements on boundary lines so as to divide the geographic areas for which these applicants would seek cable television franchises. Do you find from a preponderance of the credible evidence that these arrangements were part of a

conspiracy in unreasonable restraint of trade, in violation of Section 1 of the Sherman Act. Answer "yes" or "no."

ANSWER: No.

INTERROGATORY NO. 3

Do you find from a preponderance of the credible evidence that one or more of the defendants participated in a conspiracy in unreasonable restraint of trade to limit competition for cable television franchises, in violation of Section 1 of the Sherman Act? Answer "yes" or "no."

ANSWER: Yes.

* * * * * *

INTERROGATORY NO. 4

Do you find from a preponderance of the credible evidence that any of the following persons participated in that conspiracy? Answer "yes" or "no."

a. City of Houston

Yes

b. Mayor Jim McConn

Yes

c. Gulf Coast Cable Television

Yes

INTERROGATORY NO. 5

Do you find from a preponderance of the credible evidence that either of the conspiracies, if you have so found in answer to Interrogatories 1 or 3, proximately caused injury to the plaintiff's business or property? Answer "yes" or "no."

ANSWER: Yes.

* * * * * *

INTERROGATORY NO. 6

What sum of money, if paid now in cash, do you find from a preponderance of the credible evidence would fairly and reasonably compensate plaintiff for the damages, if any, you find plaintiff has incurred? Answer in dollars and cents, if any.

ANSWER: $2,100,000.00.

The jury's verdict was not destined to be entered into judgment. In a post-trial motion, defendant Gulf Coast argued for judgment notwithstanding the verdict on three grounds. Defendant asserted that all of plaintiff's evidence had related to boundary agreements so that there was no evidence to support the jury's finding of an independent conspiracy under interrogatory three. Likewise, defendant claimed that there was no evidence exclusive of boundary agreements to support the finding of causation on the fifth interrogatory.[5] In a thorough and carefully researched opinion, *Affiliated Capital Corp. v. City of Houston*, 519 F.Supp. 991 (S.D.Tex.1981), the district court granted the requested relief. Although the judge found evidence independent of the boundary agreements to support the answer to interrogatory three,[6] he concluded that

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5. Defendant also argued that the *Noerr-Pennington* doctrine mandated judgment notwithstanding the verdict. This contention is discussed in a later portion of this opinion.

6. In response to defendant's motion, plaintiff cited a wealth of evidence to demonstrate a second theory of conspiracy. In its memorandum opinion the court set out all the evidence which it agreed would support a second theory of conspiracy to limit competition:

By late August 1978, Clive Runnells, on behalf of Gulf Coast, had agreed with Meca that they would be friendly competitors. Testimony of Clive Runnells. Al Levin, Affiliated Capital's lawyer during the franchising process testified that by September 20, 1978, he contacted Bill Chamberlain, an agent of Gulf Coast. Chamberlain told him that Gulf Coast's attorney Bill Olson "was a pushing force of the cable TV situation at that point." Levin further testified that he then contacted Olson and Olson told him, "as far as I am concerned, Al, it's too late; the pie has already been cut." Olson added: "Al, tell Billy [Goldberg] he is too late on this one." "[Olson's] words were, 'the City is locked up by five franchises.' " On the day before this telephone conversation between Levin and Olson, Olson had told Jonathan Day, an attorney for Houston Cable, that Olson was "trying to put a map together" and that "most of the areas are defined on eastern side." Plaintiff's Exhibit 63.

On September 28, 1978 a lawyer for Houston Cable wrote to the lawyer for Gulf Coast regarding the franchise ordinance:

> Enclosed is a copy of the proposed cable television ordinance marked to show deletions and additions, including some recommended

plaintiff had failed to demonstrate that its injury was caused by anything other than defendants' boundary agreements. Thus, there was no evidence to support interrogatory five.

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by our FCC counsel. Also enclosed is an unmarked copy for your convenience.

The enclosed form of the proposed ordinance has been placed in our word processing equipment. Consequently, any changes or additions you wish to make can be easily accommodated. As we discussed, the enclosed form should be considered as an internal working draft so that we can reach an agreed proposal to present to the city.

Plaintiff's Exhibit 14. A week later he wrote another letter recounting that they had met on this franchise ordinance, and noting their discussions of various provisions of this proposed ordinance, including the provision with respect to the percentage of the City's interest in the gross revenues from the ordinances:

> Enclosed is a revised form of CATV ordinance with the changes we discussed at our last meeting in Section 8.G; Section 10.B; Section 11.D; Section 12.H, J, and M; and Section 23.A.
>
> Also enclosed is a suggested revision to Section 20.A regarding the three percent of gross revenue issue in the event we are unsuccessful in limiting the franchise fee to regular subscriber service.
>
> If you have further comments or suggestions regarding this proposed form of ordinance, please let me know.

Plaintiff's Exhibit 15. None of the referenced sections of the proposed ordinance relates to boundaries.

In October 1978, Runnells and others met with Mayor McConn. At that meeting Runnells was informed that McConn wanted Westland to have a franchise. Westland had applied for a portion of the area sought by Gulf Coast, and the Mayor indicated to Gulf Coast that a general area, Westbury-Meyerland, was what he wanted Westland to have. Testimony of Clive Runnells; Testimony of James McConn.

On November 22, 1978, notice of the November 29th City Council agenda indicated that six (6) ordinances, five of which ultimately were approved, would be considered. On November 27, 1978, the attorney for Houston Cable, one of the applicants scheduled on the upcoming agenda, sent a final proposed cable television ordinance to the City Attorney:

> Enclosed is a revised form of the proposed cable t.v. ordinance which includes the modifications made this week-end.
>
> In order to meet the proposed time schedule, any further revisions must be agreed by 12 noon on Tuesday, November 28. Final proofing of the enclosure will be completed by that time.

Plaintiff's Exhibit 29. He also sent a copy of the ordinance to Gulf Coast's attorney, who had discussed it with the lead counsel for Houston Cable earlier that morning:

footnote continued on next page

[T]he agreements to allocate and divide territory cannot be considered as evidence proving causation of plaintiff's

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> Enclosed is the proposed cable t.v. ordinance which Jonathan Day discussed with you this morning. Also enclosed is a copy of the transmittal letter to the City attorney.
>
> I have marked significant changes in red in order to facilitate your review. If you have any questions or comments, please let me know.

Plaintiff's Exhibit 30. The next day Houston Cable's attorney sent copies of the ordinances to the ultimately successful applicants. The proposed ordinances were complete except for the names of the applicants and their proposed service area. Plaintiff's Exhibits 32 & 189. The successful applicants then filled in the blanks with their names and service areas, and forwarded the ordinances to the City Attorney. Some applicants sent their proposed ordinances back to the Houston Cable Attorney who then forwarded them to the City. Plaintiff's Exhibit 35.

The agenda for the City Council meeting of November 29, 1978 contained six (6) cable television franchises, not including plaintiff's, Plaintiff's Exhibit 33; those ordinances had been placed on the agenda on or before November 22, 1978, Plaintiff's Exhibit 174. When Affiliated attorney Levin heard of this, he contacted Assistant City Attorney Adrian Baer. Baer relayed the following information to Levin:

> [T]he Mayor and City Council had made their decision, and [Baer] said, 'I learned this directly from the Mayor, the franchises are non-exclusive, he does not know about the areas, it's still being worked out by Williams and Baer . . . so the net result will be a de facto exclusive.
>
> He [,Baer,] explained to me that there were—the decisions as to who was going to get what areas, specifically in terms of the actual boundaries, were still under negotiations, but the decision as to who was fait accompli.

Testimony of Al Levin; Plaintiff's Exhibit 106.

After an on-site inspection of the Gulf Coast's Bellaire facilities, Sadowski, the consultant hired by the City of Houston, told Earle, Director of Public Service, and Baer, Assistant City Attorney, that he would reject Gulf Coast's application. The next morning, Sadowski was fired. One day later a messenger from Earle retrieved the notes Sadowski had made concerning the applications. In his notes, Sadowski had not recommended that Gulf Coast's application be rejected, in spite of his oral suggestion to that effect to Earle and Baer, and he testified that he would have made no substantive changes in his report after the visit to Gulf Coast's facilities. He had recommended in his report, however, that Gulf Coast be given a smaller franchise area than that for which it had applied. When Sadowski's notes were typed by someone in the City, that recommendation was deleted. Moreover, other significant changes were reflected in the typed version of the notes Sadowski had turned over to Earle's messenger: his recommendations that Houston Community Cable, Houston Cable, and Columbia (Westland) be rejected were changed

injury, and no other evidence in the record, either direct or inferential, provides the necessary connection between

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to recommendations that they should continue to be considered; and his statement that Cablecom had presented the only satisfactory application was omitted. Testimony of Robert Sadowski.

Prior to the plaintiff's hearing before City Council on December 12, 1978, McConn suggested to Goldberg that Affiliated seek a franchise in another area of the City rather than in the area sought by Gulf Coast. McConn testified as to his motivation for the suggestion: "I thought that, in trying to really help Mr. Goldberg, it was pretty obvious to me that Gulf Coast had the muscle and that Mr. Goldberg did not."

At the City Council hearing on plaintiff's application which was conducted on December 12, 1978, the following comments were made by Councilman Goyen:

> Mr. Goldberg, let me address Council's wisdom. As these applications came in, they were sent to the Legal Department. Obviously, a number of lawyers got together and did whatever they did. I was not privy to it nor did I want to sit in on any meeting.
>
> Apparently, they came up with the formula that those applicants agreed upon. I was hoping that your situation might end up in the same pot as the others, whereby there would be some kind of recommendation coming before this Council, and this Council would not have to carve from one to give to another, which we have not had to do in the past and which I do not want to do now nor do I intend to.
>
> I do not want to taketh away and giveth to somebody else, because I haven't had to do that in the past. You have a very competent attorney, and the other people have very competent attorneys. What I would like to see done, and it might take a motion to get this done, is to send this to the Legal Department and try to work something out.

Plaintiff's Exhibit 150 at 27-28. Subsequently, the Council discussed how to proceed with plaintiff's application, and Councilman Mann made the following suggestions:

> I want to make a substitute motion that the [plaintiff's] application be referred to the Legal Department, and they in turn can contact these other applicants who have come forward and see if they can work out something.
>
> . . . .
>
> If you take this, fine, then see how much Gulf Coast is going to knock off this other group on farther down and then around and around.
>
> . . . .
>
> Substitute motion that this application be referred to the Legal Department and Public Service, and they are to contact the other people that have ordinances and guarantee that these boundaries are being adjusted between them, and they report back to Council.

Plaintiff's Exhibit 150 at 37, 39, 40.

footnote continued on next page

the second theory of conspiracy to exclude non-conspirators and the plaintiff's failure to receive a franchise.

Also at that hearing, Mann indicated his knowledge of a house-count survey that had been conducted by Gulf Coast. Plaintiff's Exhibit 150 at 25. The survey resulted in a comparison between the area plaintiff was applying for and an area that was within Houston Cable's application. Plaintiff's Exhibit 84, and was conducted in conjunction with a proposal by Gulf Coast, that if Houston Cable would give the identified area to Gulf Coast, then Gulf Coast would be willing to give plaintiff its area. Testimony of Al Levin. A document, prepared sometime between November 28, 1978, and December 20, 1978, by Assistant City Attorney Baer bears an alternative boundary description for the Gulf Coast franchise including the Houston Cable area, with Baer's notation: "I-10 line shifted to Hwy. 290 without Goldberg's tract—contingency." Plaintiff's Exhibit 56.

City Council favored Gulf Coast's franchise, which subsumed the area plaintiff had applied for, and at trial several councilmen and Mayor McConn testified as to their reasons therefor. McConn's concern was to keep politically influential groups content:

> Q. You didn't want to step on anybody's political toes, did you?
>
> A. Not if I could avoid it.
>
> Q. You didn't want to make any type of political decision where some powerful person like Walter Mischer would be unhappy, did you?
>
> A. Not if I could avoid it.
>
> Q. And if all of the parties could work things out, then you wouldn't have to make any type of decision, other than approving their agreements, isn't that correct?
>
> A. Yes, generally that is correct, yes, sir.
>
> Q. And isn't that what you wanted to happen?
>
> A. That would have been beautiful, if it could have happened that way.
>
> Q. But when it didn't happen and you had to make the choice between Southwest Houston and Gulf Coast, you stated that the other—you thought the other people were more politically powerful than Southwest, isn't that correct?
>
> A. Yes, sir. I don't know if I said that, but I'll say it now.

Testimony of James McConn.

Councilman Goyen testified by deposition that he would have voted for Affiliated Capital's application if "on the 20th, Mr. Goldberg had come in and Mr. Runnels had come in, Mr. Mischer had come in, and all the principals had come, and a piece of Houston had been carved out for Mr. Goldberg with no objection by anybody." Councilman Robinson testified that he would have supported Affiliated Capital's application if plaintiff had been able to work something out with Gulf Coast to give him what he wanted. Councilman Westmoreland testified that he did not disagree with his prior deposition testimony that Affiliated had been unable to work out any type of arrangement with Gulf Coast, and for that reason Westmoreland voted in favor of Gulf Coast.

> The testimony elicited by plaintiff from its expert witness further demonstrates that what plaintiff established was a causal relationship between the applicants' agreements to eliminate overlaps in territory and the plaintiff's failure to be awarded a franchise, rather than a relationship between the agreement to exclude non-conspirators and plaintiff's injury.

Record on Appeal, vol. 9 at 1846.

IMPACT ON COMPETITION

It is abundantly clear from the record of this case that a group of Houston businessmen decided to ensure the receipt of cable television franchises by agreeing to seek separate parts of the city. That they joined together at least with the blessing of the Mayor, if not at his behest, is also certain.[7] In order to fully comprehend the devastating impact on competition occasioned by this gentlemen's agreement, we digress briefly to set out an important characteristic of the cable television industry presented by Gulf Coast.

Defendant Gulf Coast asserts that cable television, like the electric utility, is generally considered a natural monopoly. According to the common wisdom, the extremely high fixed costs incurred in preparing a cable television company for operation prevent the survival of competition in the marketplace. Plaintiff's expert witness on the cable television industry admitted that it did not make economic sense to grant franchises with overlapping boundaries. Record on Appeal, vol.

Finally, plaintiff's expert witness, Martin Malarkey, testified at length about the detrimental results of the noncompetitive franchising process in Houston, and about the benefits to residents of other cities where the process has involved competition on the merits of the applications. According to his testimony, the benefits include lower rates, provisions for sanctions in the event of noncompliance by the franchisee, provisions for performance bonds, and provisions requiring city approval prior to changes in ownership or control of the franchises. Further, he testified that normally the city itself prepares the franchise ordinance, rather than allowing applicants to do so.

519 F.Supp. at 1000-05 (footnotes omitted).

7. Record on Appeal, vol. 12, at 450.

35, at 28. The economies of scale do not approach those of electric utilities but the theory for both industries holds that the long-run average costs tend to fall as output increases. We assume for purposes of this discussion that cable television is indeed a natural monopoly and proceed to discuss the pernicious effects of the conspiracy given this factor.

Defendant Gulf Coast argues that since cable television is a natural monopoly and competition within franchise areas is impractical, the division of territories caused no harm. The boundary agreements did nothing more than conform to an important characteristic of this industry. In reality, however, the impact of these agreements is all the more devasting precisely because a natural monopoly is involved.

If there is to be no competition within a given territory, competition is only possible before the franchise is granted. Unfortunately for both Affiliated Capital and the citizens of Houston, there was no competition between the corporations that received franchises. The result was lower quality, higher priced cable television for Houston.[8]

Plaintiff's expert witness, Martin Malarkey, compared the Houston cable television ordinance with those of a number of Texas cities.[9] He testified that while no performance bond was required in Houston, it was common practice to require one. With regard to rates, the Houston ordinance states that rates can be changed upon sixty days' notice unless the city suspends them by calling a public hearing. The other cities do not countenance this practice of allowing the companies to make the first move toward rate increases. Franchise fees are also lower in Houston because the city receives three percent of gross revenues *excluding* revenues fron connections, reconnections, and sale or rental of equipment. Each customer must rent a converter for the price of $2.50 per month. When this amount is calculated for 100,000 subscribers over a year's time, the resulting sum equals a substantial loss for city coffers.

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8. Record on Appeal, vol. 34, at 23-27.

9. Record on Appeal, vol. 34, at 13-26.

In addition to opining about the relative merits of the Houston ordinance, Malarkey also noted that the procedure employed in Houson did not even permit an adequate determination of the merits of each application. He stated that the city did not adequately review the financial qualifications of the applicants.[10] He also asserted that all of the applications were woefully substandard.[11]

By far the most searing indictment of the procedure comes from a simple comparison of the requirements of the 1973 and 1979 ordinances, as the following colloquy with the expert witness demonstrates:

> Q Sir, as a further benchmark of the Houston franchising process in 1978, did I ask you to compare the franchise ordinance awarded by the City of Houston in 1973 with the ordinance awarded in '79?
>
> A Yes, sir, you did.
>
> Q If you had consulted for the City of Houston in 1978, would you have made this comparison as a matter of course?
>
> A Yes, sir.
>
> Q All right. Was the '73 ordinance, Mr. Malarkey, awarded by Houston in certain respect a better deal for the Houston consumers than the '79 ordinance?
>
> A Yes, it was.
>
> Q Did the '73 ordinance require a performance bond?
>
> A It did.
>
> Q In what amount?
>
> A $1 million, as I recall.
>
> Q Did the '79 ordinance require a performance bond?
>
> A No, sir.
>
> Q Did the '73 ordinance require free connections for city buildings, schools and colleges?
>
> A Yes, sir, it did.
>
> Q Did the '79 ordinance require such free connections?

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10. Record on Appeal, vol. 33, at 53-54.

11. Record on Appeal, vol. 33, at 58-59.

A No, sir.

Q Did the '73 ordinance require commencement of construction within 90 days after obtaining all necessary permits, licenses and certificates?

A Yes, it did.

Q Did the '79 ordinance have that type of construction commencement schedule?

A No, sir, it did not.

Q Did the '73 ordinance require that the 3 per cent franchise fee be paid to the city based upon all revenues, including revenues from the sale or rental of converters?

A It required payment on all revenues.

Q Did the '79 ordinance require payment on all revenues?

A No, sir, it did not.

Record on Appeal, vol. 34, at 27-28.

PER SE RULE

Section 1 of the Sherman Act proscribes "[e]very contract, combination . . . or conspiracy in restraint of trade or commerce . . . . " As the myriad of cases which interpret those words make clear, it is not *every* agreement in restraint of competition that is probhibited since almost every contract has that effect to some extent. In fact, most agreements are analyzed under the rule of reason.[12] This rule obliges a court to

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12. In *Chicago Board of Trade v. United States,* 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918), Justice Brandeis set forth the following classic statement of the rule of reason:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restaint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse;

consider whether the particular agreement places an unreasonable restraint on competition.

However, as the Supreme Court declared very recently in *Arizona v. Maricopa County Medical Society*, ____U.S.____, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982),

> [t]he elaborate inquiry into the reasonableness of a challenged business practice entails significant costs. Litigation of the effect or purpose of a practice often is extensive and complex. *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 [78 S.Ct. 514, 518, 2 L.Ed.2d 545] (1958). Judges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 609-610 [92 S.Ct. 1126, 1134-1135, 31 L.Ed.2d 515] (1972). And the result of the process in any given case may provide little certainty or guidance about the legality of a practice in another context.
>
> *Id.*, at 609, n. 10 [92 S.Ct. at 1134, n. 10]; *Northern Pac. R. Co. v. United States, supra* [356 U.S.] at 5 [78 S.Ct. at 518].
>
> The costs of judging business practices under the rule of reason, however, have been reduced by the recognition of *per se* rules. Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable. As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable.

102 S.Ct. at 2472-73 (footnotes omitted).

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but because knowledge of intent may help the court to interpret facts and to predict consequences.

246 U.S. at 238, 38 S.Ct. at 244.

A limited number of practices have been condemned by *per se* rules.[13] The Supreme Court, in *United States v. Topco Associates, Inc.*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972), declared that "[o]ne of the classic examples of a per se violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition." 405 U.S. at 608, 92 S.Ct. at 1133. Such agreements have been classified as naked restraints of trade. A long line of cases stretching back to the nineteenth century has condemned market division. *E.g., Addyston Pipe & Steel Co. v. United States,* 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899); *Timken Roller Bearing Co. v. United States,* 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951); *United States v. Sealy, Inc.*, 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238 (1967); *Gainesville Utilities Department v. Florida Power and Light Co.*, 573 F.2d 292 (5th Cir.), *cert. denied,* 439 U.S. 966, 99 S.Ct. 454, 58 L.Ed.2d 424 (1978).

Defendants argue vigorously against a *per se* analysis in the instant case. They concede the horizontal market division is a *per se* violation of section 1. The boundary agreements in this case, however, had no effect until they received the City Council's stamp of approval. The vertical characteristic, defendants assert, must take this case outside the *per se* rule.[14]

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13. "Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements." *Northern Pac. R. Co. v. United States,* 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958) (citations omitted).

14. Defendant Gulf Coast also asserts that a *per se* analysis is inappropriate "in this 'market' for franchises where nothing is being bought or sold in the normal sense . . . . " Defendant's Brief at 26-27. In response, plaintiff notes that one of the oldest, most frequently cited cases involving territorial market division dealt with a similar practice. *See Addyston Pipe & Steel Co. v. United States,* 175 U.S. 211 [20 S.Ct. 96, 44 L.Ed. 136] where the Court condemned an agreement between pipe manufacturers to divide territories and apportion the business among themselves. We reject defendant's proffered distinction.

It is true that this Court has applied the rule of reason to cases involving vertical territorial restrictions. *Joe Mendelovitz v. Adolph Coors Co.*, 693 F.2d 570 (1982). Vertical territorial restrictions cannot be condemned with the certainty of their horizontal counterparts. As the Supreme Court recognized in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977),

> [t]he market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition.

433 U.S. at 51, 97 S.Ct. at 2558 (footnotes omitted).

There is no question here, as there is in a vertical territorial restraint case, of a stimulation of competition. The agreement between the conspirators to "cut the pie" served only to eliminate competition from other applicants such as Affiliated. As Mr. Justice Hughes recognized in *Appalachian Coals, Inc. v. United States,* 288 U.S. 344, 53 S.Ct. 471, 77 L.Ed. 825 (1933), "Realities must dominate the judgment. . . . The Anti-Trust Act aims at substance." 288 U.S. at 360, 53 S.Ct. at 474, *quoted in Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. at 47, 97 S.Ct. at 2556. The conspiracy charged in this case is the classic horizontal territorial restraint for which the *per se* rule was designed. The fact that the Mayor and City Council were involved is of no moment except as it relates to the immunity questions with which we must now deal.

Although the district court grounded its grant of judgment on the lack of causation evidence, the court went on to consider the applicability of the immunity/exemption doctrines which could have precluded liability even if an antitrust violation had been established. The lower court rejected the applicability of these doctrines, and we adopt that portion of the district court's opinion. *Affiliated Capital Corp. v. City of Houston,* 519 F.Supp. at 1012-1029.[15]

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15. We note that the city of Houston was dismissed as a party to this action, with the concurrence of plaintiff.

Mayor McConn argues strenuously that a recent Supreme Court decision, *Harlow v. Fitzgerald,* ____ U.S. ____, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), guarantees his immunity from liability. That case announced that qualified or "good faith" immunity for public officials would be judged solely by an objective inquiry. The Court found that the subjective inquiry had proven unworkable:

> The subjective element of the good faith defense frequently has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment. And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.
>
> In the context of *Butz*'s attempted balancing of competing values, it now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to "subjective" inquiries of this kind. Immunity generally is available only to officials performing discretionary functions. In contrast with the thought processes accompanying "ministerial" tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decision-maker's experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment. Yet they also frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broadranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.

102 S.Ct. at 2737-38 (footnotes omitted).

102 S.Ct. at 2737-38 (footnotes omitted).

The Court held that

> government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

102 S.Ct. at 2738.

McConn contends that the state of the law regarding a municipal official's liability for antitrust violations was unsettled in 1978. Since he could not have known that he would be liable for violating the antitrust law, the argument continues, he is entitled to qualified immunity. This argument is based upon a misinterpretation of the Supreme Court's statement. It is not relevant whether the official knows he can be held liable for a particular violation of the antitrust law, only whether a clearly established violation exists. As stated throughout this opinion, territorial market division has long been recognized as a violation of the antitrust law. McConn cannot escape liability on this basis.

CONCLUSION

For the reasons set forth, we conclude that the territorial market division charged is a *per se* violation of section 1 of the Sherman Act. The boundary agreements certainly prevented plaintiff from securing a cable television franchise. We are constrained, therefore, to reverse the judgment of the court below and reinstate the jury's verdict of $2,100,000 in damages.

CLARK, *Chief Judge*, dissenting:

I respectfully dissent.

The majority presumes that cable television franchises are natural monopolies. Based on this assumption, it further

presumes that competition is only possible before a franchise is granted. On these two presumptions, the court then erects a third—that the rule of reason would so certainly condemn an agreement to divide areas of cable television service in a single city that, for sake of efficiency, the agreement must be ruled invalid *per se*. These presumptions are not just unwarranted, they are contrary to proof in this record about the particular business of cable television franchising in Houston, Texas.

This cases does not concern price fixing. Nor does it present a case of a group boycott, tying arrangement or a horizontal division of markets (though each of these categories has not invariably been held to be a naked restraint of trade). No applicant proposed to serve the whole city of Houston. The Council would not have accepted such an application. Therefore, the relevant geographic market for potential franchisees here is not the city of Houston, but some part or area thereof. No absolute *per se* category is presented. Absent the majority's presumptions, there is no way for me to predict with confidence that the rule of reason will condemn the present boundary agreements between franchise applicants which this jury found reasonable. Thus, I cannot say that the conduct of the applicants for franchises in this case is manifestly anticompetitive.

Under the district court's instructions, the jury was asked: Was the agreement of defendant, Gulf Coast, with other companies to allocate cable television franchise territories part of a conspiracy which constituted an unreasonable restraint of trade? The jury said no. The trial court who heard the witnesses and took the evidence found this answer was supported by the record. The majority does not controvert this. Rather, it acknowledges that the political history of cable television in Houston shows Houston voters rejected a single "monopoly" cable television franchising effort in 1972, and that the mayor's anxiety to avoid a similar situation in 1978 led to the city's demand for multiple franchises. Every applicant, including plaintiff, accepted this requirement.

Instead of analyzing the impact of these facts, the majority chooses to rely only on the theoretical testimony of the plain-

tiff's aptly named expert to create a series of presumptions. From other proof, a reasonable jury could have found the mayor's political concern, and a concomitant refusal by the Council to get into actually drawing boundary lines, dominated the actions of the applicants and produced a reasonable boundary agreement. Also, the jury could have found from the proof that a reasonable way to secure multiple franchises was to tell all prospective franchisees that applicants must define individual service areas without gaps and without overlaps.

There is no showing that plaintiff or any other potential applicant was limited as to formation of its own group of bidders. All those who wanted franchises were faced with the city's ukases that no single city-wide franchise would be granted and that the Council would not draw lines. There was an opportunity for competition in the pre-award area, even for those who started as late as plaintiff. They could have become members of a new group of bidders or tried to attract members of the existing group to go with them. Moreover, the proof shows the city could reject any part or all of any area sought when the matter came before the Council for approval. No testimony suggested that plaintiff did not have an opportunity to urge the city to require changed boundaries to make room for its tardy entry. Indeed, it did so and a request for accommodation was made. Thus, the mere fact that Gulf Coast refused Goldberg's demand that it give up a substantial part of the area the agreement allowed it to request was not enough to require the jury to find the boundary agreement kept plaintiff from competing.

There is another pro-competitive aspect of the proof that even more clearly argues against the imposition of a *per se* rule to this particular territorial agreement. The statements of plaintiff's president, Billy Goldberg, to the city Council told the jury how competition would work between franchised areas *after* they were awarded.

> "In determining the geographical breakdown of cable TV franchise areas it is my judgment that this Council is wise awarding multiple franchises throughout the city. I will say a little bit more on that at a later time.

"Conceptually, the notion of a smaller, more responsive franchise is likely to be substantially more acceptable to this community. Careful thoughts should be given to the proposition that no one applicant should receive more area to serve than could be constructed and energized within a reasonable period of time.

. . . .

"It seems to me that . . . our application for this area is more in keeping with the wishes of the people of this community previously expressed, where they indicated to me, and I think to everyone, the desire not to have the vast territories of our city under one operation, and there's a reason for it. There's a reason of competition.

" . . . [L]et me tell you where the competition comes in.

"If this Council does as I think it will do, divide this city up into as small portions as possible, you will have various cable companies throughout the city, and everybody in the city knows what the other fellow is doing. He's either got a friend or a relative over there, and they will be saying, 'Well, why is it, Mr. Goldberg, that your system and Affiliated's system doesn't have so-and-so, and if you go to the other part of town they have that service,' and that's where the area of competition comes in, and I think it's healthy."

Franchise areas, levels of service, and fees were not immutable. If a franchisee's level of performance did not keep pace with neighboring cable companies, all sorts of post-franchise problems could occur, up to and including another referendum to undo everything.

I do not understand how an appellate court can erect the majority's pyramid of presumptions based on one expert's opinion, contradicted by his own employer, and allow it to overcome a factfinding by a jury that finds support in the record.

Because I believe that the jury validly found that the agreement to submit non-overlapping bids met the rule of reason, I am further compelled to agree with the district court that the

finding that any later conspiracy to refuse plaintiff's request to participate in the agreement could not have caused plaintiff harm. The interrogatories on separate conspiracies were put separately at plaintiff's insistence to accord with its theory that separate conspiracies were proven. What turns out to have been a tactical mistake should not be allowed to bootstrap to credibility a verdict that the proof establishes was unwarranted. This is especially true where the appellate device for the levitation is supplied by unsupported presumptions of wrongdoing.

The proof tells me, just as it told the jury, that those who wanted to seek a cable television franchise in Houston in 1978 knew the only way to get one was to agree with others on boundaries for multiple service areas that would cover the city without overlaps. The jury found that after the group had validly made these agreements, plaintiff sought to have the group redo its plans and was improperly rebuffed. The district court reasoned that the failure to get a franchise was solely the result of the valid agreement, not the invalid rebuff. So do I.

At a time when the clear trend in antitrust law is away from the use of the "expedient" *per se* rule, except for price fixing, and toward proving the truth of particular transactions, it seems altogether wrong to rely on speculative malarkey to assume that a conspiracy to restrain trade existed.

I would affirm the district court.[1]

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1. As an aside, and because the majority's holding required that it address the *Noerr-Pennington* doctrine, I would briefly point out that the district court's analysis of this issue (the only analysis on which the majority relies) necessarily depends on a fact determination that the city and mayor participated in a conspiracy to unreasonably restrain trade by requiring defendants to agree on territorial boundaries. In adopting this reasoning, the majority overlooks the same basic premise missed by the district court. This judicial fact-finding is antithetical to the district court's determination that adequate proof supported the jury's finding to the contrary. That the decision-makers may have been members of a later conspiracy to refuse to change boundary lines does not affect their administrative position vis-a-vis the initial agreement.

In the

United States District Court

For the Southern District of Texas

519 F.Supp. 991 (1981), Civ. A. No. H-79-1331.

AFFILIATED CAPITAL CORPORATION, et al.,
Plaintiffs,

v.

CITY OF HOUSTON, et al.,
Defendants.

Memorandum and Order.

July 7, 1981.

CARL O. BUE, JR., *District Judge*

I. The Pending Motions and The Court's Ruling

Various post-trial motions are pending before the Court: (1) plaintiff's Motion for Injunctive Relief and for Entry of Judgment in Accordance with the Verdict; (2) defendant McConn's Motion for Judgment on the Verdict; (3) defendant Gulf Coast's Alternative Motions for Judgment on the Verdict, Judgment Notwithstanding the Verdict or for New Trial; and (4) defendants City of Houston's and McConn's Motion for Judgment Notwithstanding the Verdict. Having considered the record of this case, the issues addressed in the memoranda, and the arguments of counsel, the Court rules as follows with regard to the motions: (1) plaintiff's motion should be denied in its entirety; (2) defendants' motion for judgment on the

verdict or for new trial should be denied; and (3) defendants' motions for judgment notwithstanding the verdict should be granted.[1]

In this complex and protracted anti-trust case which resulted in a jury verdict for the plaintiff, the instant rulings by the Court are necessarily expanded upon at length in light of the trial record to explain the reasoning utilized in reaching a decision adverse to plaintiff. The issues basically revolve around the meaning of two of the jury's answers to interrogatories propounded at the close of the evidence and the Court's obligation under the law at this stage of the trial to uphold the verdict if supported by the record. While persuaded that the plaintiff's proof can be viewed as advancing a second theory of conspiracy to limit competition for cable franchises separate and apart from the boundary agreements, this Court finds no evidence apart from the boundary agreements of a conspiracy which caused harm to plaintiff. Since the jury found such boundary agreements were not part of a conspiracy in unreasonable restraint of trade, the necessary nexus between a conspiracy and plaintiff's failure to receive a cable franchise is lacking. Accordingly, the defendants must prevail, and a judgment notwithstanding the jury verdict in their favor will be granted.

II. The Contentions of the Parties

The jury was instructed that in order to find that any of the defendants violated Section 1 of the Sherman Act, they had to find the following essential elements by a preponderance of the credible evidence:

> (1) that the particular defendant entered into a conspiracy or agreement with one or more other persons; and

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1. Plaintiff also has filed a motion for leave to file a second amended complaint, in which the only new allegations are those related to plaintiff's standing as a consumer within the Gulf Coast franchise area to seek injunctive relief against Gulf Coast. Inasmuch as the conclusions reflected in this Order render plaintiff's standing as a consumer a moot issue, the Court hereby denies that motion.

(2) that the object of this conspiracy or agreement was to divide and allocate territories and thereby eliminate plaintiff or others as competitors for cable television franchises in Houston; *or* that the object of this conspiracy was to limit competition to those persons who participated in the agreement.

Instruction No. 12, Jury Charge.

Further, they were instructed as follows:

It is established that Gulf Coast agreed to divide or allocate the territories within which certain cable television companies would apply for a franchise, specifically with the Houston Cable and Westland groups. The question for you to determine is whether such agreements were made as part of a conspiracy which constituted an unreasonable restraint of trade which had a substantial adverse effect on competition. Also with regard to Gulf Coast, you must determine whether Gulf Coast engaged in a conspiracy with one or more other persons to limit competition for cable television franchises in Houston. If you determine that Gulf Coast entered such a conspiracy, you must determine whether that conspiracy constituted an unreasonable restraint of trade.

With regard to the City of Houston and Mayor McConn, if you determine from a preponderance of the evidence that either of those defendants participated in or acted in furtherance of a conspiracy to divide or allocate the territories within which the cable television companies would apply for a franchise with the purpose of excluding plaintiff from a franchise, or of a conspiracy to limit competition for cable television franchises, you must next determine whether such alleged conspiracy constituted an unreasonable restraint of trade, which had a substantial adverse effect on competition.

Instruction No. 17, Jury Charge.

In conformity with the instructions, two interrogatories concerning liability on separate conspiracy theories, one specif-

ically related to boundary agreements and one related to a conspiracy independent of those agreements, were submitted to the jury. The first interrogatory encompassed the issue of whether the established boundary agreements were part of an illegal conspiracy,[2] and the jury responded with a negative answer. The third interrogatory encompassed the issue of whether any of the defendants participated in an illegal conspiracy to ensure that only co-conspirators would receive franchises,[3] and the jury responded affirmatively, finding that defendants Gulf Coast, City of Houston and Jim McConn participated.[4] The jury then found causation and damages in affirmative answers to Interrogatories Nos. 5 and 6.

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2. That interrogatory provides, in its entirety, as follows:

PLAINTIFF'S BURDEN OF PROOF

INTERROGATORY NO. 1

It is established that two or more franchise applicants, including defendant Gulf Coast, participated in agreements on boundary lines so as to divide the geographic areas for which these applicants would seek cable television franchises. Do you find from a preponderance of the credible evidence that these agreements were part of a conspiracy in unreasonable restraint of trade, in violation of Section 1 of the Sherman Act? Answer "yes" or "no".

ANSWER: No

If you have answered Interrogatory No. 1 "yes", answer Interrogatory No. 2. If you have answered Interrogatory No. 1 "no", answer Interrogatory No. 3.

3. That interrogatory provides, in its entirety, as follows:

INTERROGATORY NO. 3

Do you find from a preponderance of the credible evidence that one or more of the defendants participated in a conspiracy in unreasonable restraint of trade to limit competition for cable television franchises, in violation of Section 1 of the Sherman Act? Answer "Yes" or "No".

ANSWER: Yes

If you have answered Interrogatory No. 3 "yes", answer Interrogatory No. 4. If you have answered Interrogatory No. 3 "no", answer Interrogatory No. 5.

4. Before the case was submitted to the jury, all defendants proposed that Interrogatories 1 and 3 be combined in a single question. Plaintiff objected on the ground that combining the two questions materially would alter plaintiff's theory of the case.

Defendant Gulf Coast contends that it is entitled to judgment based on the negative answer to Interrogatory No. 1, for the following reasons:

> (1) Given the finding that the boundary agreements were not part of an unlawful conspiracy, there is no evidence to support an affirmative answer to Special Interrogatory 3;
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> (2) The finding that the boundary agreements were not part of an unlawful conspiracy precludes an affirmative answer to Special Interrogatory 5—that an unlawful conspiracy proximately caused injury to plaintiffs' business or property—since there is no evidence of any unlawful conspiracy contributing to plaintiffs' failure to obtain a franchise other than testimony linking the boundary agreements with such failure; and
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> (3) The finding that the boundary agreements were not part of an unlawful conspiracy resolves all arguments against the applicability of *Noerr-Pennington* to the facts of this case and renders that doctrine controlling as a matter of law.

Defendants City of Houston and McConn contend that they are entitled to judgment on the following grounds, *inter alia*:

> I. In light of the jury's answer to Special Interrogatory No. 1, there is no evidence to support the jury's answers to Special Interrogatories Nos. 3 and 5. . . .
>
> II. In light of the jury's answer to Special Interrogatory No. 1, the evidence is conclusive that all other actions of the Mayor and the City of Houston were within the scope of the legislative process, and are exempted from antitrust liability. . . .

Plaintiff asserts that it has never taken the position that the boundary agreements simply were a more specific and all-inclusive description of the conspiracy to limit competition. Instead, plaintiff's theory throughout the course of proceedings was that "the boundary agreements were illegal standing

alone[5] well as being part of the conspiracy to limit competition", and plaintiff asserts that the boundary agreements "were not the only acts that [it] put in evidence to establish the existence of a conspiracy to limit competition."[6] Plaintiff characterizes the conspiracy addressed in Interrogatory No. 3 as one in which the "co-conspirators agreed to limit competition from non-conspirators, including plaintiff . . ., [and agreed] to limit competition with each other."[7]

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5. Plaintiff had requested a *per se* instruction on the boundary agreements, which the Court concluded could not be submitted to the jury.

6. The Court cannot agree with plaintiff's characterization of the jury's answer to Interrogatory No. 1 as a finding only "that plaintiff had not proved by a preponderance of the evidence that *two* agreements on boundary lines were part of a conspiracy in unreasonable restraint of trade, in violation of Section 1 of the Sherman Act." (emphasis added). Neither Instruction No. 17, refer to pp. 995-996, *supra*, nor Interrogatory No. 1, refer to note 2, *supra*, was phrased to include exclusively Gulf Coast's agreements with Houston Cable and Westland. The jury was instructed to determine whether "such" agreements on boundary lines were part of a conspiracy, and the Court is persuaded that the intent of the jury instructions as well as that of the jury in responding to Interrogatory No. 1, was that all agreements to allocate and divide territories which were made among franchise applicants were encompassed by the language of the inquiry relating thereto. Accordingly, the Court concludes that the jury found that plaintiff had failed to prove that any boundary agreements which were made among applicants were part of an illegal conspiracy.

7. In discussing the differences in the two liability interrogatories, and the necessity of submitting separate questions, plaintiff observes that, "The jury . . . [was] asked whether [the boundary agreements] were proven to be part of a conspiracy in restraint of trade, and they said "no," while at the same time determining that there *was* a conspiracy in restraint of trade." Defendant Gulf Coast's analysis of the jury's answers to the two interrogatories provides an explanation of the jury's intent in so answering:

> Thus the jury must have concluded that the boundary agreements were not part of a conspiracy in unreasonable restraint of trade 'to limit competition for cable television franchises.' Nevertheless, they answered the third interrogatory in the affirmative, apparently believing there was some conduct wholly unrelated to the boundary agreements which was legally cognizable as a conspiracy in unreasonable restraint of trade to limit competition for cable franchises.

footnote continued on next page

III. The Test for Sufficiency of the Evidence and The Relevant Proof

On motions for . . . judgment notwithstanding the verdict the Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts

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The Court agrees with plaintiff that "Special Verdict 1 is a narrower, not a more precise, inquiry than Special Verdict 3," and remains of the opinion that submission of separate liability interrogatories was not only necessary for consistency with the plaintiff's theory that the boundary agreements were part of a conspiracy but were not intended to constitute an all-inclusive and exclusive description of the conspiracy, but was compelled by an evaluation of the evidence which had been presented to the jury. *See Boeing Company v. Shipman*, 411 F.2d 356, 374-75 (5th Cir. 1969) (*en banc*) ("A mere scintilla of evidence is insufficient to present a question for the jury. . . . There must be a conflict in substantial evidence to create a jury question."). Further, the Court concludes that, on the basis of the evidence which was presented to the jury, the interrogatories were constructed to avoid answers which would create irreconcilable conflict and, in fact, the answers present no such conflict. Accordingly, the Court declines to treat Gulf Coast's alternative motion as one for new trial.

The Court is required to " 'search for a view of the case that makes the jury's answers consistent.' . . . Even if a conflict exists, [the Court] must inquire whether the inconsistency can nonetheless be read as 'a consistent expression of intent that [defendants are] either liable or excluded from liability.' " *Special Promotions, Inc. v. Southwest Photos, Ltd.*, 559 F.2d 430, 432 (5th Cir. 1977), *quoting Gonzales v. Missouri R. R. Co.*, 511 F.2d 629, 633 (5th Cir. 1975) *and Griffin v. Matherne*, 471 F.2d 911, 916 (5th Cir. 1973). This Court perceives no difficulty in viewing the answers to interrogatories 1 and 3 as a consistent expression of intent that defendants are liable for participation in a conspiracy to limit competition, notwithstanding that the boundary agreements were not part of the conspiracy. As is reflected in the analysis at 1005-1010, *infra*, the deficiency arises in the sufficiency of evidence to support a finding that said conspiracy was causally related to plaintiff's injury.

Additionally, the Court observes that it is unpersuaded by defendants' assertions that plaintiff raises new, previously unpled, theories by its assertion that the conspiracy of Interrogatory No. 3 encompassed an illegal agreement to exclude non-conspirators from competition, and to limit the competition among co-conspirators. Review of Plaintiff's First Amended Complaint at ffl 38 & ffl 39, and plaintiff's Joint Pretrial Order of January 12, 1981, at 11-14, indicates that plaintiff espoused its theory of the case consistently throughout the course of proceedings.

> and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, ... The motions for . . . judgment n. o. v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict.

Boeing Company v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (*en banc*); *accord*, *Bazile v. Bisso Marine Company*, 606 F.2d 101, 104 (5th Cir. 1979), *cert. denied*, ____ U.S. ____, 101 S.Ct. 94, 66 L.Ed.2d 33 (1981). Pursuant to the Court's obligation to implement that standard, the Court carefully has reviewed documentary evidence and testimony in the light most favorable to plaintiff, and has analyzed comprehensively the plaintiff's assertions regarding the inferences to be drawn therefrom.

The Court concludes that with regard to liability of defendants for a conspiracy to limit competition of non-conspirators and to limit competition among co-conspirators, that is, whether such a conspiracy existed independent of the boundary agreements and whether defendants Gulf Coast, City of Houston and McConn participated in it, substantial evidence exists in the record to create a likelihood that reasonable persons could reach different conclusions. With regard to evidence of a causal relationship between that conspiracy and plaintiff's failure to be awarded the franchise for which it applied, however, the record presents insufficient evidence, and the Court concludes that reasonable persons could not decide otherwise. Accordingly, the Court finds that the absence of evidence of causation cannot support a verdict in plaintiff's favor based on an affirmative answer to Interrogatory No. 5.

A. The Issue of Liability

The Court agrees with plaintiff that the jury's affirmative answer to Interrogatory No. 3 reflects its "apparent conclusion that the conspiracy to limit competition was an agreement or understanding that franchises would be awarded only to those applicants that were approved by Gulf Coast and other nondefendant participants", and with defendant Gulf Coast that "apparently [the jurors believed that] there was some conduct wholly unrelated to the boundary agreements which was legally cognizable as a conspiracy in unreasonable restraint of trade to limit competition for cable franchises." As defendants have contended, plaintiff focused throughout the case on the boundary agreements and the negotiations surrounding them, as is apparent from plaintiff's pleadings and proof.[8] The jury's rejection of plaintiff's predominant theory, however, will not suffice to resolve the question of whether proof exists in the record to support a theory which plaintiff espoused but did not emphasize.

In Plaintiff's Brief Demonstrating Inferences from the Evidence, plaintiff identifies many excerpts from the testimony as well as related documentary evidence from which inferences can be drawn to support the existence of a separate theory of conspiracy to limit competition that is not contingent upon evidence concerning boundary agreements. Plaintiff has reached the correct result in its analysis of the evidence. The Court has determined, however, that some of the proof identified by plaintiff is inappropriate for consideration because that evidence relates solely to boundary agreements encompassed in Interrogatory No. 1. In order to demonstrate clearly the

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8. Defendants make much of plaintiff's closing argument and the focus therein on boundary agreements. The Court acknowledges that the content of the closing argument tends to demonstrate further that plaintiff concentrated heavily on proving the boundary agreements and relied to a large extent on the existence of the agreements to prove an antitrust violation. Relying on the closing arguments, or utilizing their content for any aspect of the resolution of these motions, however, is impermissible inasmuch as nothing contained therein constitutes evidence.

evidence apart from that of boundary agreements which tends to show the existence of, and acts done in furtherance of, a conspiracy to exclude non-conspirators and to limit competition among co-conspirators, the Court feels obligated to set forth a summary of the history of the franchise process followed in Houston and a detailed recitation of the evidence which demonstrates that the conspiracy encompassed in Interrogatory No. 3 existed.

1. History of Franchising Process

Between July 1978 and August 1978 several applications for cable television franchises were filed with the City: Gulf Coast, the first; Houston Cable; Meca; Houston Community Cable; and G. B. Communications. In September 1978, Westland also made application, and plaintiff, Affiliated Capital, having divested itself of ownership of a savings and loan association and thereby becoming eligible to apply for a franchise, hired an attorney to assist it in obtaining a franchise. In October 1978, the City hired a consultant, Robert Sadowski, to evaluate the applications; the consultant's employment was terminated in November, 1978. Also in October, plaintiff announced by letter to City Council its intention to apply for a franchise, and in November, City Council sent to plaintiff an application form. Plaintiff filed its application on November 16, 1978, and filed a supplemental application on November 28, 1978. The November 29, 1978 City Council agenda contained six cable television ordinances: Gulf Coast; Houston Cable; Meca; Houston Community; Westland; and G. B. Communications. At the November 29 meeting, the ordinances were tabled until December 13, 1978, and plaintiff was granted a hearing on its application on December 12, 1978.

After plaintiff's presentation on December 12, plaintiff's application was referred to the Public Service Department for evaluation, and all of the ordinances were tabled again so that the franchises could be referred to the public service and legal departments for their recommendations. On December 20, 1978, written recommendations from those departments for

the following applicants were made to City Council: Houston Community; Meca; Houston Cable; Westland; Gulf Coast; and Affiliated Capital. On the same date, the following ordinances were passed upon first reading: Gulf Coast; Houston Cable; Westland; and Houston Community. The franchise ordinance applications of Meca and plaintiff were tabled for one (1) week. On January 10, 1979, the franchise ordinances of Gulf Coast, Houston Cable and Westland were passed on the third and final reading. Inasmuch as Gulf Coast's franchise contained within it all of the area plaintiff had applied for, the approval of Gulf Coast effectively preempted plaintiff's application.

2. Evidence of Conspiracy

Within that framework plaintiff asserts that many of defendants' acts demonstrate the existence of agreements that "were designed to ensure that only those companies participating in the understandings would receive cable television franchises, to ensure that participating companies would not be in the position of having to compete with each other with regard to the terms of the contractual commitments each would offer the City in order to obtain a franchise, and to ensure that competitors who did not participate would be prevented from obtaining franchises." With regard to that assertion, the Court's task is to ascertain what evidence in the record tends to prove plaintiff's contentions apart from the evidence which relates solely to the boundary agreements found by the jury not to be part of the conspiracy.

The Court acknowledges that even though the jury responded negatively with regard to the boundary agreements, evidence pertaining to those agreements could demonstrate the parties' intent to conspire, when considered cumulatively with independent evidence of the conspiracy. *See, e.g., United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 n.3, 85 S.Ct. 1585, 1593 n.3, 14 L.Ed.2d 626 (1965); *United States v. Southern Motor Carriers Rate Conference*, 439 F.Supp. 29, 47 (N.D.Ga. 1977). In light of the jury's finding, however, evi-

dence pertaining to those agreements, or inferences to be derived therefrom, cannot be considered as evidence sufficient to prove the existence of the conspiracy; evidence of other conduct, wholly unrelated to the boundary agreements, and independently demonstrating, directly or circumstantially, that a conspiracy existed, must be present in the record to sustain the jury's affirmative answer to Interrogatory No. 3.

For purposes of identifying such evidence, the Court recounts below all of the proof plaintiff has designated which the Court agrees independently will support the existence of the second theory of a conspiracy. Where other portions of the evidence cited by plaintiff in its brief as supporting the second conspiracy are omitted, it is because this Court views such evidence as related solely to boundary agreements. By omitting those portions, the Court rules that, when stripped of their boundary content, the acts identified by plaintiff are no evidence of, and can evoke no inferences of, the existence of a conspiracy to limit competition.[9]

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9. For example, plaintiff cites a reference by Clive Runnells to discussions between Gulf Coast and other applicants in a letter he wrote to his partners on August 29, 1978. Plaintiff's Exhibit 10. Plaintiff asserts that an inference can be drawn therefrom that successful applicants had agreed to cooperate rather than compete. An examination of the entire paragraph from which the reference to discussions is extracted reveals that Runnells was referring to the areas the applicants had applied for and was correlating that information to Gulf Coast's chances of being successful in obtaining the area for which it had applied. He specifically made reference to boundary negotiations with other applicants:

> Regarding the Houston franchise application, I trust you have been kept informed by the newspaper articles and other information received over television and radio. To clarify the situation, enclosed is a map which appeared in the Houston Chronicle which more or less defines the areas each applicant has applied for. There is another applicant appearing this coming Wednesday afternoon, and at this time we do not know what area they will ask for. As you may or may not know, the deadline for applications has been set by the City for September 1. In light of the fact our application was the first to appear before City Council, and we have had discussions with other applicants, we feel fairly certain if franchises are granted we should receive the franchise for the southwest part of Houston. We have agreed to

By late August 1978, Clive Runnells, on behalf of Gulf Coast, had agreed with Meca that they would be friendly competitors.[10] Testimony of Clive Runnells. Al Levin, Affiliated Capital's lawyer during the franchising process, testified that by September 20, 1978, he contacted Bill Chamberlain, an agent of Gulf Coast. Chamberlain told him that Gulf Coast's attorney Bill Olson "was a pushing force of the cable TV situation at that point." Levin further testified that he then contacted Olson and Olson told him, "as far as I am concerned, Al, it's too late; the pie has already been cut."[11] Olson added: "Al, tell Billy [Goldberg] he is too late on this one." "[Olson's] words were, 'the City is locked up by five franchises.' " On the day before this telephone conversation between Levin and Olson, Olson had told Jonathan Day, an attorney for Houston Cable, that Olson was "trying to put map together" and that "most of areas are defined on eastern side." Plaintiff's Exhibit 63.

On September 28, 1978 a lawyer for Houston Cable wrote to the lawyer for Gulf Coast regarding the franchise ordinance:

> Enclosed is a copy of the proposed cable television ordinance marked to show deletions and additions, including some recommended by our FCC counsel. Also enclosed is an unmarked copy for your convenience.

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give up to the Walter Mischer et al. group the area from Katy Freeway to 290, excluding Spring Valley Village. We do not know exactly where we will stand with the Storer group, for we know they would like part of our south area, but at this time we have not reached any accommodation with them.

Plaintiff's Exhibit 10.

10. Prior to that time Gulf coast and Houston Cable had met concerning boundaries, Testimony of Clive Runnells; the jury could have found those discussions and ensuing agreement to be evidence of the applicants' intent to limit competition.

11. Defendants assert that this testimony can refer only to boundary agreements. The Court concludes that, in light of the testimony regarding the City's being "locked up", allusions to "cutting the pie" reasonably are not confined to territories. An inference can be derived from that testimony that the defendants had decided who would get franchises regardless of what geographic areas the franchises would cover.

> The enclosed form of the proposed ordinance has been placed in our word processing equipment. Consequently, any changes or additions you wish to make can be easily accommodated. As we discussed, the enclosed form should be considered as an internal working draft so that we can reach an agreed proposal to present to the city.

Plaintiff's Exhibit 14. A week later he wrote another letter recounting that they had met on this franchise ordinance, and noting their discussions of various provisions of this proposed ordinance, including the provision with respect to the percentage of the City's interest in the gross revenues from the ordinances:

> Enclosed is a revised form of CATV ordinance with the changes we discussed at our last meeting in Section 8.G; Section 10.B; Section 11.D; Section 12.H,J, and M; and Section 23.A.
>
> Also enclosed is a suggested revision to Section 20.A regarding the three percent of gross revenue issue in the event we are unsuccessful in limiting the franchise fee to regular subscriber service.
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> If you have further comments or suggestions regarding this proposed form of ordinance, please let me know.

Plaintiff's Exhibit 15. None of the referenced sections of the proposed ordinance relates to boundaries.

In October 1978, Runnels and others met with Mayor McConn. At that meeting, Runnells was informed that McConn wanted Westland to have a franchise. Westland had applied for a portion of the area sought by Gulf Coast, and the Mayor indicated to Gulf Coast that a general area, Westbury-Meyerland, was what he wanted Westland to have.[12] Testimony of Clive Runnells; Testimony of James McConn.

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12. In developing the evidence concerning the Westland matter, plaintiff further asserts the following with regard to the testimony about the November 20, 1978 meeting between Gulf Coast and Westland which was scheduled at the Mayor's direction:

On November 22, 1978, notice of the November 29th City Council agenda indicated that six (6) ordinances, five of which ultimately were approved, would be considered. On November 27, 1978, the attorney for Houston Cable, one of the applicants scheduled on the upcoming agenda, sent a final proposed cable television ordinance to the City Attorney:

> Clive Runnells testified that there were two separate and distinct aspects of the meeting between Gulf Coast and Westland. First, Gulf Coast received Westland's agreement to take a different boundary than it had applied for. Second, Runnells testified that it was "a good possibility" that the Westland meeting "was an insurance policy that if City Council followed the Mayor's wishes that [Gulf Coast] wouldn't get [their] application denied in its entirety." Testimony of Clive Runnells, Jan. 29, 1981, at 47-48, App. Exh. 10. This again, provides an inference of the nature of the understanding: those applicants party to the understanding who were willing to cooperate rather than compete would get franchises, and others, including plaintiff, would not.

An examination of Runnells' testimony on that matter reveals that Runnells felt that because Gulf Coast had made an accommodation with Westland on boundaries, Gulf Coast's application likely would not be rejected in its entirety by City Council if City Council followed the Mayor's wishes with regard to Westland's application. The conditioning of the "insurance policy" on the boundary agreements is inescapable, however, and the Court perceives no possible inference from that testimony that the boundaries and the "insurance policy" were two separate and distinct aspects of the meeting. Furthermore, no possible inference can be drawn that the willingness to cooperate rather than to compete had any frame of reference other than cooperation with regard to boundary agreements. The testimony of Runnells on January 29, 1981 with the regard to that matter was as follows:

> Q Well, sir, the fact of the matter is you did receive two things from the Westland meeting, did you not, and the first thing you received was their agreement to take a different boundary than they had applied for, that's number one, they didn't snuggle up under your soft belly?
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> A It could be construed as that, yes, sir.
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> Q The second thing you received, was it not, Mr. Runnells, was an insurance policy that if city council followed the mayor's wishes that you wouldn't get your application denied in its entirety, that was the second thing you received, wasn't it, sir?
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> A I—
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> Q That was a possibility?
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> A That was a good possibility, yes, sir, but I don't say it was an insurance policy. I feel we received nothing from it.

Testimony of Clive Runnells.

> Enclosed is a revised form of the proposed cable t.v. ordinance which includes the modifications made this week-end.
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> In order to meet the proposed time schedule, any further revisions must be agreed by 12 noon on Tuesday, November 28. Final proofing of the enclosure will be completed by that time.

Plaintiff's Exhibit 29. He also sent a copy of the ordinance to Gulf Coast's attorney, who had discussed it with the lead counsel for Houston Cable earlier that morning:

> Enclosed is the proposed cable t.v. ordinance which Jonathan Day discussed with you this morning. Also enclosed is a copy of the transmittal letter to the City attorney.
>
> I have marked significant changes in red in order to facilitate your review. If you have any questions or comments, please let me know.

Plaintiff's Exhibit 30. The next day Houston Cable's attorney sent copies of the ordinances to the ultimately successful applicants. The proposed ordinances were complete except for the names of the applicants and their proposed service area. Plaintiff's Exhibits 32 & 189. The successful applicants then filled in the blanks with their names and service areas, and forwarded the ordinances to the City Attorney. Some applicants sent their proposed ordinances back to the Houston Cable Attorney who then forwarded them to the City. Plaintiff's Exhibit 35.

The agenda for the City Council meeting of November 29, 1978 contained six (6) cable television franchises, not including plaintiff's, Plaintiff's Exhibit 33; those ordinances had been placed on the agenda on or before November 22, 1978, Plaintiff's Exhibit 174.[13] When Affiliated attorney Levin heard

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13. In analyzing the evidence, the Court is obligated to give plaintiff the benefit of all reasonable inferences which can be derived from the evidence which was presented to the jury. Plaintiff's assertions with regard to the agenda are as follows:

of this, he contacted Assistant City Attorney Adrian Baer. Baer relayed the following information to Levin:

> The evidence also shows that the ordinances were placed on the agenda for the November 29 Council meeting on or before November 22. Plaintiff's Exh. 174, Supp. App. Exh. 2. Clearly the five ordinances were placed on the agenda before the City knew the agreed-to boundaries for the five franchises, since the Council was not provided with the completed ordinances and a map of the boundaries until November 29. Plaintiff's Exh. 35, App. Exh. 13. This evidence permits an inference that the successful applicants were assured of their success before the City knew what boundaries had been agreed to, or even whether boundaries had been agreed to. Additionally, the fact that the attorneys for the applicants worked over the weekend of November 25 and 26, and knew of the deadline imposed by the Council meeting on November 29, Plaintiff's Exh. 29, App. Exh. 11, indicates that they knew then that they would be the successful applicants.

Defendants City of Houston and McConn make certain assertions concerning the import of that evidence which tend to demonstrate the tenuous nature of that proof as support for plaintiff's position:

> Plaintiff also argues that the mere appearance of the five (5) successful applicants on the agenda is further evidence of a conspiracy to exclude plaintiff. What the plaintiff does not point out is the fact that it would have been virtually impossible for plaintiff to even have been considered, much less excluded, in light of the fact that the first serious step which plaintiff took toward acquiring a franchise was the completion of its questionnaire and its filing only two days prior to the posting of the agenda. [November 16, 1978. Further, plaintiff did not file its supplemental application until November 28, 1978.] Since the agenda, by law, must be posted a certain number of days prior to Council action, it is completely illogical to infer that some conspiracy exists simply because counsel for the applicants which appeared on the agenda, and the City Attorney, continued their negotiations as to franchise language and boundaries after the agenda was posted. If Council was going to vote on the ordinances on November 29, it was incumbent that the ordinances be in final form by that date. Plaintiff's Exhibits 29 and 30 demonstrate conclusively that negotiations were still proceeding on the terms of the franchise as late as the weekend of November 25 and 26, and, indeed, "significant changes" were made in the terms of the ordinance during that negotiating session. (See Plaintiff's Ex. 30).

The Court further points out that the ordinances were scheduled for a first reading on November 29, 1978, and three readings were required before approval was final. Plaintiff's Exhibit 150 at 39-40. Nevertheless, the Court must consider the agenda evidence because it possibly might support an inference favorable to plaintiff, particularly when it is considered in combination with evidence concerning Baer's conversation with Levin about the agenda, which is described at 1001-1003, *infra*.

> [T]he Mayor and City Council had made their decision, and [Baer] said, 'I learned this directly from the Mayor, the franchises are non-exclusive, he does not know about the areas, it's still being worked out by Williams and Baer . . . so the net result will be a de facto exclusive."
>
> He [, Baer,] explained to me that there were—the decisions as to who was going to get what areas, specifically in terms of the actual boundaries, were still under negotiations, but the decision as to who was fait accompli.

Testimony of Al Levin; Plaintiff's Exhibit 106.

After an on-site inspection of Gulf Coast's Bellaire facilities, Sadowski, the consultant hired by the City of Houston, told Earle, Director of Public Service, and Baer, Assistant City Attorney, that he would reject Gulf Coast's application. The next morning, Sadowski was fired. One day later a messenger from Earle retrieved the notes Sadowski had made concerning the applications. In his notes, Sadowski had not recommended that Gulf Coast's application be rejected, in spite of his oral suggestion to that effect to Earle and Baer, and he testified that he would have made no substantive changes in his report after the visit to Gulf Coast's facilities. He had recommended in his report, however, that Gulf Coast be given a smaller franchise area than that for which it had applied. When Sadowski's notes were typed by someone in the City, that recommendation was deleted. Moreover, other significant changes were reflected in the typed version of the notes Sadowski had turned over to Earle's messenger: his recommendations that Houston Community Cable, Houston Cable, and Columbia (Westland) be rejected were changed to recommendations that they should continue to be considered; and his statement that Cablecom had presented the only satisfactory application was omitted. Testimony of Robert Sadowski.

Prior to the plaintiff's hearing before City Council on December 12, 1978, McConn suggested to Goldberg that Affiliated seek a franchise in another area of the City rather than in

the area sought by Gulf Coast. McConn testified as to his motivation for the suggestion: "I thought that, in trying to really help Mr. Goldberg, it was pretty obvious to me that Gulf Coast had the muscle and that Mr. Goldberg did not."

At the City Council hearing on plaintiff's application which was conducted on December 12, 1978, the following comments were made by Councilman Goyen:

> Mr. Goldberg, let me address Council's wisdom. As these applications came in, they were sent to the Legal Department. Obviously, a number of lawyers got together and did whatever they did. I was not privy to it nor did I want to sit in on any meeting.
>
> Apparently, they came up with the formula that those applicants agreed upon. I was hoping that your situation might end up in the same pot as the others, whereby there would be some kind of recommendation coming before this Council, and this Council would not have to carve from one to give to another, which we have not had to do in the past and which I do not want to do now nor do I intend to.
>
> I do not want to taketh away and giveth to somebody else, because I haven't had to do that in the past. You have a very competent attorney, and the other people have very competent attorneys. What I would like to see done, and it might take a motion to get this done, is to send this to the Legal Department and try to work something out.

Plaintiff's Exhibit 150 at 27-28. Subsequently, the Council discussed how to proceed with plaintiff's application, and Councilman Mann made the following suggestions:

> I want to make a substitute motion that the [plaintiff's] application be referred to the Legal Department, and they in turn can contact these other applicants who have come forward and see if they can work out something.
>
> . . . .

> If you take this, fine, then see how much Gulf Coast is going to knock off this other group on farther down and then around and around.
>
> . . . .
>
> Substitute motion that this application be referred to the Legal Department and Public Service, and they are to contact the other people that have ordinances and guarantee that these boundaries are being adjusted between them, and they report back to Council.

Plaintiff's Exhibit 150 at 37, 39, 40.

Also at that hearing, Mann indicated his knowledge of a house-count survey that had been conducted by Gulf Coast. Plaintiff's Exhibit 150 at 25. The survey resulted in a comparison between the area plaintiff was applying for and an area that was within Houston Cable's application, Plaintiff's Exhibit 84, and was conducted in conjunction with a proposal by Gulf Coast that if Houston Cable would give the identified area to Gulf Coast, then Gulf Coast would be willing to give plaintiff its area. Testimony of Al Levin. A document, prepared sometime between November 28, 1978, and December 20, 1978, by Assistant City Attorney Baer bears an alternative boundary description for the Gulf Coast franchise including the Houston Cable area, with Baer's notation: "I-10 line shifted to Hwy. 290 without Goldberg's tract—contingency." Plaintiff's Exhibit 56.

City Council favored Gulf Coast's franchise, which subsumed the area plaintiff had applied for, and at trial several councilmen and Mayor McConn testified as to their reasons therefor. McConn's concern was to keep politically influential groups content:

> Q You didn't want to step on anybody's political toes, did you?
>
> A Not if I could avoid it.
>
> Q You didn't want to make any type of political decision where some powerful person like Walter Mischer would be unhappy, did you?

A Not if I could avoid it.

Q And if all of the parties could work things out, then you wouldn't have to make any type of decision, other than approving their agreements, isn't that correct?

A Yes, generally that is correct, yes, sir.

Q And isn't that what you wanted to happen?

A That would have been beautiful, if it could have happened that way.

Q But when it didn't happen and you had to make the choice between Southwest Houston and Gulf Coast, you stated that the other—you thought the other people were more politically powerful than Southwest, isn't that correct?

A Yes, sir. I don't know if I said that, but I'll say it now.

Testimony of James McConn.

Councilman Goyen testified by deposition that he would have voted for Affiliated Capital's application if "on the 20th, Mr. Goldberg had come in and Mr. Runnells had come in, Mr. Mischer had come in, and all the principals had come in, and a piece of Houston had been carved out for Mr. Goldberg with no objection by anybody." Councilman Robinson testified that he would have supported Affiliated Capital's application if plaintiff had been able to work something out with Gulf Coast to give him what he wanted. Councilman Westmoreland testified that he did not disagree with his prior deposition testimony that Affiliated had been unable to work out any type of arrangement with Gulf Coast, and for that reason Westmoreland voted in favor of Gulf Coast.[14]

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14. Defendants assert that the evidence of what Councilman Goyen said at the December 12 hearing, of the contingency proposal by Gulf Coast and of the councilmen's reasons for favoring Gulf Coast cannot be considered because all of that evidence concerns boundary agreements, which agreements the jury determined were not unlawful. Interrogatory No. 1 which the jury answered negatively asked whether the boundary agreements were part of the conspiracy, not whether the boundary agreements themselves were illegal.

footnote continued on next page

Finally, plaintiff's expert witness, Martin Malarkey, testified at length about the detrimental results of the noncompetitive franchising process in Houston, and about the benefits to residents of other cities where the process has involved competition on the merits of the applications. According to his testimony, the benefits include lower rates, provisions for sanctions in the event of noncompliance by the franchisee, provisions for performance bonds, and provisions requiring city approval prior to changes in ownership or control of the franchises. Further, he testified that normally the city itself prepares the franchise ordinance, rather than allowing applicants to do so.

Having reviewed the entire record and excised the portions of the evidence which relate solely to boundary agreements, the Court is persuaded that sufficient evidence was presented for

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The plaintiff's inconsistent interpretations of the jury's answer to that question, however, demonstrate how illusory is its assessment of what was intended by the jury to be the scope of its negative answer. In one place in Plaintiff's Brief Demonstrating Inferences from the Evidence, plaintiff asserts that "The jury was *not* asked whether the boundary agreements were themselves unreasonable restraints of trade; they were asked whether they were proven to be part of a conspiracy in restraint of trade. . . ." In another place in the same brief, plaintiff asserts that "Since the words 'part of' were never defined, the jury might simply have ignored them or (which would amount to the same thing) construed them to mean that the boundary agreements had to share all the characteristics of a conspiracy in unreasonable restraint of trade as defined in the instructions, including anti-competitive purpose, unreasonableness, and causation." The latter interpretation of the jury's answer is equivalent to saying that the jury found that the boundary agreements were not unlawful.

The Court believes that the more reasonable interpretation of the jury's answer to Interrogatory No. 1 is that the jurors thereby intended to convey that they perceived nothing wrong in the applicants' having made boundary agreements. Resolution of the issue, however, is unnecessary to the Court's determination of whether the evidence under examination falls within the scope of Interrogatory No. 3. Interrogatory No. 1 specifically addressed boundary agreements which had been accomplished; the jury's negative answer thereto, accordingly, cannot preclude consideration as independent evidence of a conspiracy either the City officials' encouragement to applicants to adjust further the agreements already made, or Gulf Coast's attempts to adjust further the agreement between itself and Houston Cable.

the jury to infer that each of the defendants had participated in a conspiracy to limit competition from nonconspirators and to limit competition among co-conspirators. Defendant McConn has asserted that none of the evidence apart from that related to boundary agreements tends to demonstrate his involvement in any cónspiracy as described by plaintiff. The Court concludes that a review of the above-recited evidence belies McConn's contention. Defendant Gulf Coast asserts that inasmuch as its general partner, Clive Runnells, was the sole decision-maker on behalf of Gulf Coast and was exonerated by the jury, Gulf Coast cannot be liable even if a conspiracy is supported by the evidence. Preliminarily, the Court observes that Chamberlain and Olson were agents of Gulf Coast and acted on behalf of Gulf Coast in many of the contacts with the City. Secondarily, even though the jury found that plaintiff failed by a preponderance of the evidence to prove that Runnells participated in the conspiracy, the jury could have considered evidence of the acts of Runnells, in combination with those of other agents of defendant, in deciding that the corporate defendant participated in the conspiracy.

B. The Issue of Causation

Plaintiff asserts that evidence of causation necessarily is inferential and that, having considered all of the evidence which supports the existence of the second theory of conspiracy, "the jury could have concluded that when Affiliated was directed to negotiate with its competitors for a place in the franchise package, it was not the boundary agreements that injured plaintiff, but the unwillingness of the private participants in the conspiracy to divide up the pie any further." With regard to that assertion, defendant Gulf Coast counters that, "In other words, causation lay in the unwillingness of the private parties further to amend their boundary agreements on a voluntary basis. In the absence of them, the issue would not have arisen. This hardly can be said to represent evidence *apart from the boundary agreements* of a conspiracy which caused harm to plaintiffs." The Court is constrained to agree with defendant.

The five franchises which ultimately were awarded and which were represented among the ordinances considered by City Council on December 20, 1978, covered the entire city.[15] Accordingly, even though one could infer from the evidence that the successful applicants' refusal to accommodate plaintiff resulted in plaintiff's not having its franchise application approved, the sole reason that plaintiff failed to receive a franchise was that Gulf Coast refused to readjust boundary agreements previously made. Had the boundary agreements not been made, the city well might not have been covered by the successful applicants' franchises. The boundaries, however, were established before the ordinances were considered by Council. The applicants thereby had eliminated the primary, and perhaps only, concern of the Council,[16] and the applicants declined to accommodate plaintiff by renegotiating or readjusting those boundaries previously agreed upon. The jury clearly found that those boundary agreements were not part of a conspiracy in unreasonable restraint of trade in their answer to Interrogatory No. 1. Thus, the agreements to allocate and divide territory cannot be considered as evidence proving causation of plaintiff's injury, and no other evidence in the record, either direct or inferential, provides the necessary connection between the second theory of conspiracy to exclude non-conspirators and the plaintiff's failure to receive a franchise.

The testimony elicited by plaintiff from its expert witness further demonstrates that what plaintiff established was a causal relationship between the applicants' agreements to

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15. Between December 20, 1978 and January 10, 1979, a further adjustment was made between applicants with regard to the boundaries of the Meca and Houston Community Cable franchises. Plaintiff's Exhibits 41 & 97. That readjustment, however, does not alter the facts that on December 20, 1978 and January 10, 1979, the five prevailing franchise applications covered the entire geographical area of the city.

16. Clive Runnells testified that sometime before July 17, 1978 he had "received word from City Hall that if boundaries could be agreed to, City Hall would be happy about it."

eliminate overlaps in territory and the plaintiff's failure to be awarded a franchise, rather than a relationship between the agreement to exclude non-conspirators and plaintiff's injury. The sum of plaintiff's direct evidence of causation is revealed in the following excerpts from the testimony of Martin Malarkey. Preliminarily, plaintiff asked its expert to opine whether overlapping franchises should have been awarded.

> Q Does it make any sense to you, Mr. Malarkey, from your experience, if you are granting franchises, to grant overlapping areas? Does it make economic sense to do that, sir?
>
> A Two franchises for the same area?
>
> Q Yes, sir.
>
> A No, sir, it does not.
>
> Q Sir, if a franchise that a city does award does not overlap, then where is there any competition in the cable industry?
>
> * * * *
>
> A Competition takes place when the city advertises for bids, for applicants to come in and offer to provide service to an entire community or given parts of the community.
>
> Q So the competition takes place in the franchising process—
>
> A Absolutely.
>
> Q —itself?
>
> A Yes, sir.

Testimony of Martin Malarkey, February 4, 1981.

Plaintiff then asked about the correlation between overlapping franchise areas and competition on the merits of the applications:

> Q Sir, if applications were filed by several companies for the same areas, and if overlaps between these applicants were not resolved by agreement or any way else, based upon your experience in other cities would there have been competition on the merits of these applicants?
>
> A Absolutely.

Q By the way, sir, other than what you have heard about Houston, in '78, are you aware of any market where the applicants, either before or after they were selected by City, got together, themselves, and eliminated boundary overlaps between them?

A No, sir. I have never—I have not heard of that.

Testimony of Martin Malarkey, February 4, 1981.

As indicated by the excerpts of testimony recounted below, all of plaintiff's causation questions which were related to plaintiff's failure to receive a franchise sought to establish a connection between that failure and the boundary agreements. Plaintiff did ask its expert witness many questions related to the causal connection between the non-competitive nature of the Houston franchising process and the detrimental effects on consumers in Houston; however, any injury inflicted on the public cannot be substituted for the direct injury of which plaintiff complained and for which plaintiff sought damages. The following questions were posed by plaintiff to its expert:

Q Based on those three assumptions,[17] sir, that I gave you, do you have an opinion as to whether the elimination of all other boundary disputes prior to December 20 contributed to Affiliated's failure to obtain a franchise?

A Yes, it certainly did.

Q Could you explain that opinion, sir, to the ladies and gentlemen of the jury?

A Yes, sir, I will try to.

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17. The assumptions were as follows:

Q The first assumption I would like you to accept, Mr. Malarkey, is that the decision between Gulf Coast and Affiliated Capital was made on the merits on December 20. Can you accept that?

A Yes, sir.

Q Will you accept another assumption, sir, that Gulf Coast and Affiliated Capital were equally qualified, as the Public Service and Legal Department said?

A Yes, sir.

Q I would like you also to assume, sir, that Gulf Coast was more qualified than Houston Cable or Westland, all right?

A Yes, sir.

Testimony of Martin Malarkey, February 5, 1981.

If we assume that Westland and Houston Cable were not as well qualified as Gulf Coast and Affiliated Capital—first of all, the die was cast at this point in time, and when you have large companies that have already agreed on the boundaries Affiliated Capital wouldn't have had a chance, regardless of how qualified it was.

But given the fact that there were overlaps and that Affiliated Capital and Houston—I beg your pardon and Gulf Coast were equally qualified, then council could have given this portion that was under contention back to Gulf Coast and given what Affiliated Capital requested to Affiliated Capital. Gulf Coast would have ended up with an even larger section than they have today.

And if you wanted to assume that Westland was equally as well qualified, and that had been granted to Westland and this portion had been granted to Gulf Coast and Affiliated Capital would have been given the area that they had applied for, Gulf Coast today would have had still a larger area than it has.

Testimony of Martin Malarkey, February 5, 1981.

The expert witness also discussed the reasons he believed that an applicant would have incentive not to engage in competition with another applicant for the same area:

Q Based upon your experience in cable television was it in the economic interest of each applicant in this market to avoid competing with the other applicants for the same territory?

A It certainly was.

Q Sir, have you prepared a list of the reasons you believe an applicant has an incentive not to engage in competition with another for the same area?

. . . .

Q Mr. Malarkey, this chart, which reads, "Incentive for Applicants to Agree on Areas That They Will Seek," will you describe for us, sir, what the first incentive is?

A Well, the first one, in effect, says let's avoid having any losers altogether, in effect. Let's just have winners in

this process; avoid one of the applicants being denied a franchise or getting less than the desired area.

Q Could you explain to us, sir, what the second incentive to avoid competition would be?

A Well, that is fairly self-explanatory. I said here avoid the need to compete on the merits, as to the ability and services and the rates offered. In a highly competitive procedure there would have been very substantial competition with regard to the—not only the financial aspect, but the services, the programming to be offered and the charges that they were going to ask for those services. That was completely out, here in Houston.

Q And the third factor, sir?

A Well, as I understand it, a referendum in the State of Texas only requires a rather limited number of signatures, and the applicants here in Houston have been pretty well divided up, and the last thing in the world they wanted to face is a referendum, which would upset these procedures and perhaps force the City to go into a competitive franchising process.

Testimony of Martin Malarkey, February 4, 1981.

A review of that testimony indicates that the expert believed that one reason applicants might wish to agree on territories is that they thereby would ensure their own success and a second reason is that they would not have to compete on other franchise terms. Thus, plaintiff elicited testimony from its expert which demonstrates that the boundary agreements were the foundation of and incentive for not only the objective of the conspiracy but also the other agreements among applicants which prove the existence of the conspiracy.

The Court perceives that evidence as being in direct contradiction to plaintiff's assertion that, "The jury could have concluded that the boundary agreements were not 'part of' the conspiracy because all competition between the applicants had already been eliminated by agreement not to compete on franchise terms. Once the successful applicants agreed not to compete against each other on the merits and to limit competi-

tion from outsiders, boundary agreements were simply incidental to and not 'part of' the conspiracy." Although plaintiff appropriately can argue that the jury is free to consider any reasonable inference from the evidence, including that above, what plaintiff's expert described to the jury was a reverse situation from what plaintiff now argues was inferred by the jury:[18] the applicants agreed on boundaries for the reason that they thereafter, and consequently, would ensure their success and would not have to compete on other terms. The jury's finding that the boundary agreements, which plaintiff's evi-

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18. In one part of its brief, plaintiff characterizes the expert's testimony in the same way that the Court has done, that is, that the boundary agreements were the focal point and the initiating cause of the conspiracy:

> For example, consider the fact that plaintiff's expert testified that the purpose of the boundary agreements was to remove any incentive for the conspirators to compete as to franchise terms. *See* Testimony of Martin Malarkey, Feb. 4, 1981. The jury may have believed, however, the conspirators agreed not to compete on franchise terms, and generally to be "friendly competitors," without regard to whether they overlapped with one another. The four results of the noncompetitive franchising process to which Mr. Malarkey testified, *id.* at 57-61, would have occurred without regard to boundary overlaps if the conspirators simply agreed not to compete as to franchise terms.

Said assertion was made in the context of plaintiff's identifying the evidence which would support the existence of the conspiracy addressed in Interrogatory No. 3. Plaintiff's characterization of what the jury "may have believed" is appropriate with regard to the existence of the conspiracy in light of the other evidence which the Court believes was presented on that issue.

In the context of isolating evidence of causation, however, the testimony of plaintiff's expert constitutes the sum of what plaintiff presented, and all the jury had before it was the evidence that the pre-packaged deal which resulted from previous boundary agreements was the factor that caused plaintiff's failure to have its franchise application approved. The Court perceives no difference in result, even when plaintiff's failure to be approved is described as having arisen out of the combination of the City's instructions to plaintiff to seek approval of the other applicants who already had agreed on boundaries and those applicants' subsequent refusal to readjust prior agreements or to surrender territory identified pursuant to those agreements, in order to make room for plaintiff. Plaintiff wanted and applied for only an area that would have infringed upon the territory Gulf Coast had identified and applied for after Gulf Coast agreed on boundaries with other applicants. Plaintiff failed to receive its franchise because Gulf Coast and the other applicants refused further to adjust their boundaries to accommodate plaintiff.

dence demonstrated were the essential factor in plaintiff's failure to get its franchise approved, leaves plaintiff in the dilemma of having proved that a second theory of conspiracy existed to exclude non-conspirators and to limit competition among co-conspirators, but of having presented no proof other than that of boundary agreements which connects that conspiracy to plaintiff's failure to obtain its franchise.

Plaintiff's expert then proceeded to explain what he ascertained were the results of Houston's non-competitive franchising process, which he previously had characterized as non-competitive on the ground that territorial overlaps had been eliminated. None of those results tended to show a connection between the conspiracy the jury found and plaintiff's injury. The only result articulated by Malarkey which might relate to plaintiff's injury is the first: "Applicants were not considered on the merits." Malarkey explained that result as meaning that "there was absolutely no consideration given to the merits of each of the applicants with regard to programming, prices to be charged, technical aspects. Of course, the financial aspect." Testimony of Martin Malarkey, February 4, 1981. That result, however, cannot be relied upon to establish the necessary connection, because Malarkey also testified that all applications, including plaintiff's, were well below standard and not at all informative as to many important aspects of a franchise application. The only factor on which Malarkey concluded that plaintiff was better qualified than any of the five ultimately successful applicants was plaintiff's financial capability to build the cable system that it had applied for. Thus, the only conclusion that reasonably can be inferred from the expert's testimony is that none of the applications was considered on the merits because the five successful applicants had eliminated that necessity by entering into boundary agreements and thereby presenting a ready-made package to City Council.

The evidence recited herein constitutes all of the evidence which plaintiff presented on causation. The Court concludes that none of the evidence tends to demonstrate any cause for

plaintiff's failure to be awarded a franchise other than the fact that the successful applicants made agreements with regard to what territories they would seek. Accordingly, the jury's affirmative answer to Interrogatory No. 5 on causation is totally unsupported by probative evidence in the record of this trial, and cannot be upheld.

IV. The Propriety of Injunctive Relief

Plaintiff has requested two forms of injunctive relief: (1) prohibition against further agreements in restraint of trade; and (2) voiding of the franchise granted to Gulf Coast. Plaintiff asserts that it has standing to obtain both types of injunctive relief, and that with regard to the voiding of Gulf Coast's franchise, plaintiff has standing both as a competing applicant and as a potential consumer of cable television services in the area awarded to Gulf Coast.[19] Having been denied its motion

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19. Concerning plaintiff's status as a competing applicant, defendants in essence contend that plaintiff has sought damages for the loss of its franchise at the fair market value of the franchise and that plaintiff therefore is not entitled to a double recovery by having the Gulf Coast franchise voided and thereby being able to compete again for the franchise. Plaintff counters that it "is a proper person to seek injunctive relief even if defendants are correct in their assertion that as a potential competitor plaintiff lacks standing because it has been compensated for the value fo the franchise it sought." Further, plaintiff asserts that it has such standing as a potential consumer on the basis of its first amended complaint; however, plaintiff has moved for leave to file a second amended complaint which alleges with specificity its standing to seek injunctive relief as a potential consumer.

The Court does not agree that the allegations of plaintiff's first amended complaint suffice to accord plaintiff standing as a potential consumer. Further, the Court has denied plaintiff leave to file its second amended complaint, refer to note 1, *supra*, not only because the issue is moot in light of the rulings herein, but also because the Court is unpersuaded that fairness would compel such a result or that the traditional rules of equity would allow it. As defendant Gulf Coast points out, this eleventh-hour request should be estopped by the maxim that he who comes to equity must come with clean hands. Even if plaintiff's post-trial effort to amend its complaint cannot be characterized as an act of bad faith, at least it is perceived by this Court as an untimely effort to change the posture of the lawsuit so that plaintiff can seek a double recovery. In asserting that a post-trial evidentiary hearing on plaintiff's entitlement to injunctive relief as a potential consumer would not

for entry of judgment, plaintiff is not entitled to any form of injunctive relief; however, the Court engages in the following analysis to demonstrate that, even had plaintiff prevailed, it would not have been awarded injunctive relief in any form for the reason that plaintiff lacks standing to seek such relief.

Injunctive relief pursuant to the antitrust laws is "available even though the plaintiff has not yet suffered actual injury . . .; he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Zenith Radio Corporation v. Hazeltine Research, Inc.*, 395 U.S. 100, 130, 89 S.Ct. 1562, 1580, 23 L.Ed.2d 129 (1969) (citations omitted). "[A] private plaintiff may obtain injunctive relief against such violations only on a showing of 'threatened loss or damage'; and this must be of a sort personal to the plaintiff." *United States v. Borden Company*, 347 U.S. 514, 518, 74 S.Ct. 703, 706, 98 L.Ed. 903 (1954) (citation omitted). A private plaintiff "must not only show the violation of the antitrust laws, but show also the impact of the violations upon him, *i.e.*, some injury (or threatened injury where injunctive relief only is sought) proximately resulting from the antitrust violation." *Credit Bureau Reports, Inc. v. Retail Credit Company*, 476 F.2d 989, 992 (5th Cir. 1973) (citations omitted).

With regard to the first requested form of injunctive relief, plaintiff makes the following contention:

> The franchise ordinances are, by their terms, nonexclusive. Accordingly, even in the absence of an order voiding Gulf Coast's franchise, subsequent applicants—including plaintiff, whose application is still pending—are not precluded from receiving a franchise to serve part of the City of Houston. The jury determined that defendants Mayor McConn, the City of Houston, and Gulf Coast partici-

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prejudice the rights of any defendant, plaintiff apparently overlooks the fact that the trial on the merits was consolidated with the injunction hearing. The Court is unpersuaded that the facts of this case require that plaintiff be given a second opportunity either to plead or to prove a different theory of its case.

> pated in a conspiracy to limit competition for cable television franchises. The City may be called upon to act on an application for a cable television franchise between now and the time the franchises expire by their terms. Moreover, at the expiration of the franchise term, the City will certainly have to act on applications for franchises. Accordingly, it is appropriate that the defendants be enjoined from participating in the future in a conspiracy to limit competition for cable television franchises.

With regard to plaintiff's assertion involving nonexclusive franchises and its still-pending application, the Court observes that plaintiff's expert witness testified at trial that awarding two (2) franchises for the same area would not be economically feasible. Accordingly, plaintiff's threatened injury comprised of having its pending application disapproved even if Gulf Coast's franchise is not voided is extremely remote at best. If Gulf Coast's franchise is not voided, and plaintiff accepts an award of a franchise within Gulf Coast's territory, plaintiff would be making a decision contrary to its economic interest. Accordingly, the Court concludes that the likelihood that plaintiff would suffer injury from having its current application turned down cannot consitute the "significant threat of injury" required by the *Zenith* holding.

With regard to plaintiff's threatened injury at the expiration of the current franchise period, the Court is compelled to point out that Mr. Goldberg testified at trial that he had given up on getting a franchise and wanted only to be compensated for his loss. Further, at the hearing on the post-trial motions plaintiff's counsel assured the Court that plaintiff would not seek a cable television franchise in Houston, even if Gulf Coast's franchise in Houston, even if Gulf Cost's franchise were voided and the area for which plaintiff originally had applied became available. In light of that assertion, the Court has difficulty identifying any significant threat of injury to the plaintiff when the current franchises expire. Thus, the Court concludes the plaintiff has failed to identify any threatened injury "of a sort personal to the plaintiff", as required by the United States Supreme Court in *Borden,* and plaintiff's entitle-

ment to seek an injunction prohibiting defendants from participating in agreements in restraint of trade must fail. For the same reasons, plaintiff also is not entitled to seek injunctive relief in the form of voiding Gulf Coast's franchise.

Plaintiff admonishes the Court that it must consider the public interest as well as the private interest in its resolution of the injunction issue. The Court acknowledges that the citizens of Houston likely were injured in the form of receiving inferior cable television services as a consequence of the non-competitive franchise process which is reflected in the record of this cause. The Court's concern for the public interest, however, is limited by the perimeters of the case before it and cannot obviate in this instance the necessity for plaintiff to have standing to seek injunctive relief. Plaintiff asks, "If this plaintiff does not have standing, what plaintiff would?" This inquiry is rhetorical at best in light of the allegations of plaintiff's first amended complaint which represent plaintiff only as a competing applicant, and in light of plaintiff's untimely attempt to amend its complaint further to reflect the status of potential consumer. The latter status, as plaintiff apparently belatedly recognized, provides the answer to plaintiff's question.

As defendant Gulf Coast points out, the relevant antitrust statute "does not dispense with the requirement of standing for a private plaintiff nor does it create attorneys general with authority to vindicate public interests out of private plaintiffs who have no private interests to be served." In determining that the private injunction action under the antitrust laws supplements and does not supplant Government enforcement of the antitrust laws, the *Borden* Court observed that "it is the Attorney General and the United States district attorneys who are primarily charged by Congress with the duty of protecting the public interest under these laws. . . . the private plaintiff may be expected to exercise [his injunctive remedy] only when his personal interest will be served." *United States v. Borden Company, supra*, 347 U.S. at 518, 74 S.Ct. at 706. Having brought suit as a competing applicant to serve its personal

interest of recouping money damages for loss of its franchise, plaintiff may not now persuade the Court to grant an injunction either on the basis that the Court has an obligation to act as guardian of the public interest, or on the ground that plaintiff must be permitted belatedly to change its status as well as the complexion of the case so that plaintiff can be characterized as a member of the cable-consuming public. In the current posture of the case plaintiff clearly has no standing to seek injunctive relief.

Finally, the Court must agree with defendants that voiding Gulf Coast's franchise would afford plaintiff an opportunity to seek a double recovery, regardless of whether plaintiff would avail itself of such opportunity. Had the record supported the jury's verdict, plaintiff would have received actual damages which were calculated on the basis of the fair market value of the franchise plaintiff did not receive. For the Court then to void Gulf Coast's franchise and thereby enable plaintiff to compete again, and possibly be awarded the opportunity to earn that amount a second time, would provide to plaintiff a double recovery. As a competing applicant, plaintiff elected to pursue a full damage remedy for its injury; injunctive relief is available only when no adequate remedy at law can be obtained. Plaintiff may not have both a remedy at law and one in equity.[20]

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20. Gulf Coast points out another deficiency in the broad scope of injunctive relief sought by plaintiff:

> [E]ven if Affiliated were to be accorded standing as a single member of the purchasing public, it would then encounter another traditional rule that 'equity acts specifically' and affords the petitioner in equity the specific thing to which it is entitled. 30 C.J.S. *Equity* § 101 (1965). If it were shown . . . that as a result of antitrust violations Affiliated, the private purchaser, had been foreclosed from the possibility of receiving 'data transfer, burglar and fire alarm protection, and the like' . . . , then its equitable relief would be formulated around those services. Equity would not act to require forfeiture of an entire franchise covering 40% of the City of Houston when a remedy could be afforded in terms of specific services for a specific customer.

V. The Immunity/Exemption Doctrines

Defendant Gulf Coast contends that even if the acts relied upon by plaintiff to prove the existence of a conspiracy to exclude non-conspirators would support the jury's finding that such a conspiracy existed, those acts fall within the scope of the *Noerr-Pennington* doctrine which would render Gulf Coast immune from antitrust liability. See *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965) (hereinafter *Pennington*); *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) (hereinafter *Noerr*). Inasmuch as the Court has concluded that the jury verdict in favor of plaintiff cannot be sustained because of the deficiency of evidence of causation, defendant Gulf Coast need not rely on the *Noerr-Pennington* doctrine to avoid liability. For the same reason, defendants City of Houston and McConn need not rely on the immunity/exemption doctrines which they have asserted preclude their liability, refer to discussion at 1023-1029, *infra*. Nevertheless, the Court will analyze those doctrines in order to demonstrate that they would have been inapplicable on the current record, even if plaintiff had prevailed on the causation issue.

A. Noerr-Pennington Immunity

In *Noerr*, truckers sued their competitors, the railroads, for violations of the Sherman Act which were premised on the railroads' having conducted a "publicity campaign against truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, to create an atmosphere of distaste for the truckers among the general public, and to impair the relationships existing between the truckers and their customers." *Noerr*, *supra*, 365 U.S. at 129, 81 S.Ct. at 525. In reversing the judgment holding that the railroads' campaign had violated the antitrust laws, the Supreme Court held that "at least insofar as the railroads" campaign was directed toward obtaining governmental action, its legality was not at all affected by any

anticompetitive purpose it may have had." *Id.* at 139-40, 81 S.Ct. at 531. Prior to so ruling, the Court had observed that "It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors." *Id.* at 139, 81 S.Ct. at 530. The Court further found that a contrary construction of the Sherman Act not only would deprive public officials of valuable sources of information on matters affecting their decision-making but also would deprive people of their right to petition with regard to issues significantly affecting their own interests. *Id.*

The *Pennington* Court reaffirmed and expanded the *Noerr* doctrine by finding that, regardless of their intent or purpose, joint efforts to influence public officials do not constitute illegal conduct, "either standing alone or as part of a broader scheme itself violation of the Sherman Act." *Pennington, supra*, 381 U.S. at 670, 85 S.Ct. at 1593. *Pennington* involved a counterclaim of a small mine operator which alleged, *inter alia*, that the labor union and large mine operators had approached the Secretary of Labor and the Tennessee Valley Authority with certain proposals intended to drive small mine operators out of business. The Court found that such acts were exempt from Sherman Act coverage pursuant to the doctrine of *Noerr*.[21]

In both *Noerr* and *Pennington*, the Supreme Court articulated circumstances wherein certain activities could be excepted

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21. The United States Supreme Court has determined that the doctrine of *Noerr* and *Pennington* also applies to the adjudicatory functions of administrative agencies and to judicial proceedings, but that it must be adapted when applied in such a context. *See California Motor Transport Company v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642(1971), wherein the Supreme Court analyzed and defined the contours of the sham exception to *Noerr-Pennington* in the context of adjudicatory proceedings. Inasmuch as the City Council in the instant cause was acting in a legislative capacity during the franchising process, *see, e.g., Metro Cable Company v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975), the decisions involving an adjudicatory setting have only ancillary application to this case. The Court, however, finds the decisions instructive even if they are not dispositive of the issues herein.

from the protection accorded petitioning, and therefore justify applicability of the Sherman Act. The *Noerr* Court provided the following exception to the immunity doctrine: "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.' *Noerr*, 365 U.S. at 144, 81 S.Ct. at 533. The *Pennington* Court noted certain errors which the lower courts had made regarding damages, and in the course of that discussion concluded that "The conduct of the [private parties] did not violate the Act, the action taken to set a minimum wage . . . was the act of a *public official who is not claimed to be a co-conspirator*, and the jury should have been instructed, . . . to exclude any damages . . . suffered as a result of the [public official's] . . . determinations." *Pennington*, 381 U.S. at 671, 85 S.Ct. at 1594 (footnote omitted) (emphasis added).

Pursuant to this Court's analysis of the law on *Noerr-Pennington*, the jury was instructed fully on the two exceptions to the doctrine. With regard to the co-conspirator exception derived from *Pennington*, they were charged, in substance, as follows: "Joint efforts truly intended to influence public officials to take official action do not violate the antitrust laws even though the efforts are intended to eliminate competition, unless one or more of the public officials involved was also a participant in an illegal arrangement or conspiracy." Instruction No. 18. In the same Instruction the *Noerr* sham exception was explained: "The petitioning activity must be genuine. Protection does not extend to purported petitioning that is in fact a mere sham to cover what actually is nothing more than an attempt to interfere directly with the business of a competitor. That is, protection does not extend to activities that are merely a pretext for inflicting on plaintiff an injury not caused by any governmental action."

Thus, over the objection of Gulf Coast, the jury was permitted to consider two ways in which Gulf Coast would be prohibited from availing itself of *Noerr-Pennington* immunity, and in answer to Interrogatory No. 3, the jury found that Gulf Coast was not entitled to that immunity. Inasmuch as the Court concludes, for the reasons recited below, that the validity of the public official co-conspirator exception is well supported in the case law, and the justification for invoking the exception clearly is sustained by the record herein, the Court sees no need to analyze the facts of this case as they relate to the second exception, that involving sham activities, which first was espoused in *Noerr*.[22]

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22. Most courts have reserved the sham exception label for circumstances in which the conduct of the private parties is questionable, that is, where the activities of the private parties are not genuinely engaged in to petition government for action in the parties' self-interest, but are engaged in solely to inflict some injury on another party. *See, e.g., Kurek v. Pleasure Driveway & Park District of Peoria, Illinois*, 557 F.2d 580 (7th Cir. 1977), *vacated and remanded*, 435 U.S. 992, 98 S.Ct. 1642, 56 L.Ed.2d 81 (1978), *reinstated*, 583 F.2d 378 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090, 99 S.Ct. 873, 59 L.Ed.2d 57 (1979). Some courts, however, also have applied the sham exception label in situations where the conduct of a public official is challenged. Thus, those courts have determined that when a public official is alleged to be a co-conspirator, no separate exception to *Noerr-Pennington* is created; instead such a situation falls within the sham exception. *See, e.g., In re Airport Car Rental Antitrust Litigation*, 521 F.Supp. 568 (N.D.Cal.1981); *Federal Prescription Service, Inc. v. American Pharmaceutical Association*, 484 F.Supp. 1195, 1209 (D.D.C. 1980).

Other courts have decided that the public official as co-conspirator represents an entirely separate exception to *Noerr-Pennington*, rather than being part of the sham exception rather than public conduct. Those courts have indicated that separate-exception-view either by determining, without mentioning sham, that *Noerr* and its progeny would not bar applicability of the Sherman Act, *see, e.g., Duke & Company, Inc. v. Foerster*, 521 F.2d 1277 (3rd Cir. 1975) *and Harman v. Valley National Bank of Arizona*, 339 F.2d 564 (9th Cir. 1964), or by engaging in a bifurcated analysis of the co-conspirator exception and the sham exception, *see, e.g., Kurek v. Pleasure Driveway & Park District of Peoria, Illinois, supra*. The result of either analysis, of course, would be the same: the conduct of the private parties is infected or invalidated by the illegal conduct of the public officials, thereby precluding the private parties from invoking *Noerr-Pennington* immunity.

In order to relate to this case those decisions in which courts have recognized the co-conspirator exception, the Court will outline the evidence tending to demonstrate that McConn and certain public officials acting as agents for the City not only were involved actively in the conspiracy to exclude non-conspirators but also directed certain of the activities of co-conspirators. The Court concludes that these actions amply demonstrate that McConn did more than merely agree to support the efforts of private conspirators. *Cf. Metro Cable Company v. CATV of Rockford, Inc.*, 516 F.2d 220, 230 (7th Cir. 1975) (Court found that inasmuch as Congress did not intend the Sherman Act to apply to "combined efforts to induce legislative action, [it could not have intended] the Act to apply if a member of the legislative body agreed to support those efforts." *Id.* at 230).

Preliminarily, the Court points out some of the background of the franchising process that was revealed during trial. The Court acknowledges that such facts are not evidence of the conspiracy; however, they should be brought out not only to demonstrate the elected representatives' lack of concern for obtaining the best available cable television services for the citizens of Houston, but also to provide at least a partial explanation for the ease with which the conspiracy in restraint of trade was formulated and perpetrated.

Plaintiff's expert witness testified that the franchising process is important in assuring that consumers get the best possible cable television services at the lowest possible rates. He further said that the way for a city to ensure vigorous competition for areas designated for cable television services is to invite applications from everyone who would be interested, and that the customary way for the city's interest to be exhibited is through advertisements in various trade journals. The expert opined that in 1978, Houston was a very attractive market for cable operators who vigorously would have competed for a franchise. The City, however, did not advertise its interest in acquiring cable television services, nor did it use any other method to invite a variety of applications. Further, he testified that franchise applications customarily are evaluated

by persons knowledgeable in the field, and that when consultants are retained, they generally are brought in at the beginning of the process. A consultant usually would be involved in various aspects of the process, including the following: (1) drafting a franchise ordinance for submission to the city; (2) preparing requests for proposal documents and instructions to bidders; (3) evaluating each application, individually as well as comparatively; and (4) drafting the enabling ordinance. Although the first application for a cable television franchise in Houston was filed in July of 1978, the City did not hire a consultant until October. Having missed the preliminary steps described above, the consultant began an evaluation of the applications, but his employment was terminated in November 1978, before he prepared a final report. The testimony as to why he was fired was conflicting; however, at least Councilman Westmoreland felt that the Council could accomplish the franchising process without the benefit of the consultant's assistance.[23] Malarkey also testified that normally a city incorporates into the franchise ordinance the promises made by applicants during the franchise process. The City of Houston did not do that, and in the expert's opinion, the City now cannot enforce the promises the applicants made either to City Council or in their applications. As a result of the kinds of activities identified above, the City received and reviewed applications, all of which were below standard in Malarkey's opinion.

With that background, the Court will proceed to identify the activities of public officials in Houston which clearly demonstrate that the City and McConn participated in the conspiracy. Much of the same evidence previously has been recounted in the discussion of liability, at 999-1005, *supra;* however, the Court deems necessary a repetition of that evidence relating

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23. At trial various of the elected representatives who participated in the selection process indicated that they have little, if any, comprehensive knowledge of cable television systems. Indeed, the record without exception reflects that the Mayor and council really never cared to obtain such knowledge; instead they preferred to place their imprimatur on the substantive aspects of a proposal agreed upon by the favored applicants.

solely to the co-conspirator exception. Thereafter, the Court will apply to that evidence the decisions in which various courts have concluded that participation of public officials in the alleged conspiracy precludes the availability of *Noerr-Pennington* immunity.

1. Evidence of Official Involvement

In September 1978, Westland made an application for a franchise within the area for which Gulf Coast had applied. One of the persons involved in the Westland group was McConn's attorney and others were his personal friends. In order to ensure Westland's success, McConn called representatives of Gulf Coast to his office in October, informed them that he felt Westland should have a franchise, and instructed them to go out and talk with the Westland group. Testimony of Clive Runnels. Subsequently, Runnells, on behalf of Gulf Coast, met with Westland because he felt that the Mayor's message was "loud and clear" that Westland would get a franchise.

On November 27, 1978, the attorney for Houston Cable sent a final proposed cable television ordinance to the City Attorney, apprising the City Attorney of modifications the applicants had made and setting a timetable for any further revisions. Plaintiff's Exhibit 29. The next day, Houston Cable's attorney sent copies of the ordinances to the ultimately successful applicants. The proposed ordinances were identical in all material respects and were complete except for the names of the applicants and their proposed service area. Plaintiff's Exhibits 32 & 189. The successful applicants then filled in the blanks with their names and service areas, and forwarded the ordinances to the City Attorney. Some applicants sent their proposed ordinances back to the Houston Cable Attorney who then forwarded them to the Ctiy. Plaintiff's Exhibit 35.

The agenda for the City Council meeting of November 29, 1978 contained six (6) cable television franchises, not including plaintiff's, Plaintiff's Exhibit 33. When Affiliated attorney Levin heard of this, he contacted Assistant City Attorney Adrian Baer. Baer told Levin that the Mayor and City Council

already had decided. Baer further told Levin, "I learned this directly from the Mayor, the franchises are non-exclusive, he does not know about the areas, it's still being worked out by Williams and Baer . . . so the net result will be a de facto exclusive." Baer also explained to Levin that the decisions as to who was going to get what areas, specifically in terms of the actual boundaries, were still under negotiation, but the decision as to who was fait accompli. Testimony of Al Levin; Plaintiff's Exhibit 106.

After an on-site inspection of Gulf Coast's facilities, the consultant hired by the City told two City officials that he would reject Gulf Coast's application. The next morning, the consultant was fired and subsequently his notes concerning the applications were picked up by a messenger from the City. The consultant had recommended in his report that Gulf Coast be given a smaller franchise area than that for which it had applied. When his notes were typed by someone in the City, that recommendation was deleted. Moreover, other significant changes wre reflected in the typed version of the notes he had turned over to the City's messenger: his recommendations that Houston Community Cable, Houston Cable, and Columbia (Westland) be rejected were changed to recommendations that they should continue to be considered; and his statement that Cablecom had presented the only satisfactory application was omitted. Testimony of Robert Sadowski.

Prior to the plaintiff's hearing before City Council on December 12, 1978, McConn suggested to Goldberg that Affiliated seek a franchise in another area of the City rather than in the area sought by Gulf Coast. McConn testified as to his motivation for the suggestion: "I thought that, in trying to really help Mr. Goldberg, it was pretty obvious to me that Gulf Coast had the muscle and that Mr. Goldberg did not."

At the City Council hearing on plaintiff's application, which was conducted on December 12, 1978, Councilman Goyen addressed the following remarks to Goldberg: "I do not want to taketh away and giveth to somebody else, because I haven't had to do that in the past. You have a very competent attorney, and the other people have very competent attorneys. What I

would like to see done, and it might take a motion to get this done, is to send this to the Legal Department and try to work something out." Plaintiff's Exhibit 150 at 27-28. Subsequently, Councilman Mann made the following suggestion: "I want to make a substitute motion that the [plaintiff's] application be referred to the Legal Department, and they in turn can contact these other applicants who have come forward and see if they can work out something." Plaintiff's Exhibit 150 at 37. Also at that hearing, Mann indicated his knowledge of a house-count survey that had been conducted by Gulf Coast in conjunction with a proposal by Gulf Coast that if Houston Cable would give a certain area to Gulf Coast, then Gulf Coast would be willing to give plaintiff its area. Testimony of Al Levin. A document, prepared sometime between November 28, 1978 and December 20, 1978, by Baer contains an alternative boundary description for the Gulf Coast franchise which includes the Houston Cable area, and has Baer's notation as follows: "I-10 line shifted to Hwy. 290 without Goldberg's tract—contingency." Plaintiff's Exhibit 56.

Mayor McConn testified that he ultimately voted in favor of Gulf Coast, which vote effectively precluded plaintiff's being successful, in order to keep certain influential political groups content. Councilman Goyen testified by deposition that he would have voted for Affiliated Capital's application if "on the 20th, Mr. Goldberg had come in and Mr. Runnells had come in, Mr. Mischer had come in, and all the principals had come in, and a piece of Houston had been carved out for Mr. Goldberg with no objection by anybody." Councilman Robinson testified that he would have supported Affiliated Capital's application if plaintiff had been able to work something out with Gulf Coast to give plaintiff what it wanted. Councilman Westmoreland testified that he did not disagree with his prior deposition testimony that Affiliated had been unable to work out any time of arrangement with Gulf Coast, and for that reason he voted in favor of Gulf Coast.

The public officials' acknowledged motivations prompted them to instruct plaintiff to try to negotiate with the other applicants, which actions, in the view of this Court, constitute

more than mere acquiescence in private conspirators' plans or mere support of private parties' efforts to induce favorable legislative results. The actions of Mayor McConn were those of an active co-conspirator not content merely to accede to the wishes of private parties. In addition, the actions of the councilmen and other agents of the City demonstrate the City's vigorous involvement in orchestrating certain aspects of the conspiracy.

2. Legal Basis for the Co-Conspirator Exception

The rulings of the Supreme Court in *Noerr* and *Pennington* were derived from fact situations involving private parties who allegedly had conspired to induce governmental action. Neither case involved an allegation that any governmental entity or offical had participated in or acted to promote the conspiracy. Accordingly, this Court must look to the progeny of *Noerr* and *Pennington* not only to determine the viability of an exception arising out of a public official's being a co-conspirator but also to define the contours of such an exception.

In *Harman v. Valley National Bank of Arizona,* 339 F.2d 564 (9th Cir. 1964), the Court considered the sufficiency of the allegations contained in plaintiff's complaint, and reversed the district court's dismissal of the complaint. In discussing the validity of defendants' *Noerr* contentions, the Court found that *Noerr* would not necessarily preclude the applicability of the Sherman Act on two grounds: (1) the petitioning activities were alleged to be but one element in a larger scheme; and (2) the acts of the State Attorney General were alleged to be those of a participating conspirator. *Id.* at 566. For the second ground, the Court relied on the question reserved by the United States Supreme Court in *Parker v. Brown,* 317 U.S. 341, 352, 63 S.Ct. 307, 314, 87 L.Ed. 315 (1942) concerning whether the state action exemption to the Sherman Act would apply if the state or its municipality participated in a conspiracy, and concluded that the *Noerr* Court had not held that the Act would be inapplicable in such a situation. The *Pennington* Court subsequently has ruled that joint efforts to petition a public official are not violative of the antitrust laws

even when they are part of a larger, illegal scheme. Accordingly, to the extent that the *Harman* Court held to the contrary, its decision no longer is good authority. The second ground relied on in *Harmon*, however, remains viable in view of this Court.[24]

In *Duke & Company, Inc. v. Foerster*, 521 F.2d 1277 (3rd Cir. 1975), the plaintiff alleged that three municipal corporations, three private corporations and one individual, sued both individually and in his official capacity as a county commissioner, entered into an agreement to boycott malt beverages manufactured by plaintiff in the municipal facilities operated by defendants. The district court dismissed the complaint against the three municipal corporations and the individual in

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24. Five years after *Harman*, the Ninth Circuit had occasion to affirm a summary judgment for private-party defendants in a case which involved, *inter alia*, allegations that county commissioners had participated in a conspiracy resulting in the award to one defendant of an exclusive garbage collection franchise by the county commission. *Sun Valley Disposal Company, Inc. v. Silver State Disposal Company*, 420 F.2d 341 (9th Cir. 1969). Plaintiff had relied on two cases, including *Harman*, in support of the co-conspirator exception which it urged. The *Sun Valley* Court remarked on the erosion of the first prong of *Harman* by the subsequent *Pennington* decision; however, the Court did not overrule *Harman* or even comment specifically on the co-conspirator prong of that case. The concurring Judge opined that the co-conspirator prong of *Harman* was not affected by *Pennington*, and that plaintiff simply had failed to identify enough facts to create a disputed issue. *Id.* at 344 (Browning, J., concurring in part).

In distinguishing the other case upon which plaintiff relied, however, the *Sun Valley* majority observed that "government units . . . are seldom free from personal interest and outside influences, but the Sherman Act was not intended to regulate this type of activity. There is support for this view in that *Noerr* . . . holds that so long as the official's action is itself lawful, the action is without the scope of the federal antitrust laws even if the motive for the action was a personal one." *Id.* at 342. Preliminarily, this Court observes that the evidence herein demonstrates clearly that this case involved more than the official's having personal interests and being influenced by outsiders. Secondarily, inasmuch as the discussion on a public official being a co-conspirator was not dispositive of the Court's ruling in *Sun Valley*, this Court is not persuaded that the co-conspirator ground of *Harman* is no longer good authority.

his official capacity, pursuant to the authority of *Parker, Noerr* and *Pennington*. The Third Circuit concluded that defendants were not entitled to a state action exemption pursuant to *Parker*, and in ruling that *Noerr-Pennington* immunity also was unavailable to the official and entity defendants, the Court concluded the following:

> In neither [*Noerr* nor *Pennington*] was it alleged that the governmental entity had collaborated to promote the conspiracy. Where the complaint goes beyond mere allegations of official persuasion by anti-competitive lobbying and claims offical participation with private individuals in a scheme to restrain trade, the *Noerr-Pennington* doctrine is inapplicable. *See Harman v. Valley National Bank of Arizona*, 339 F.2d 564 (9th Cir. 1964).
>
> *Parker* reserved judgment on such an alleged combination of public and private entities. After *Goldfarb* [*Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572] however, it is clear that when there is an allegation of governmental participation in such a combination to the benefit or detriment of private parties, and when the activities of the public body are not compelled by the state acting as a sovereign, a claim has been stated under the antitrust laws. No protection is afforded to such a combination under the doctrine of *Noerr-Pennington*.
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> We conclude that the allegations of the complaint state an antitrust claim against these defendants despite their governmental status.

Id. at 1282 (emphasis in original) (footnote omitted).[25]

In *Kurek v. Pleasure Driveway & Park District of Peoria, Illinois*, 557 F.2d 580 (7th Cir. 1977), *vacated and remanded,*

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25. The Third Circuit was analyzing circumstances wherein the governmental entities, rather than the private parties, were claiming *Noerr-Pennington* immunity. This Court, however, concludes that the reasoning in that case also would apply to preclude *Noerr-Pennington* immunity for the private-party defendant herein.

435 U.S. 992, 98 S.Ct. 1642, 56 L.Ed.2d 81 (1978), *reinstated,* 583F.2d 378 (7th Cir. 1978), *cert. denied,* 439 U.S. 1090, 99 S.Ct. 873, 59 L.Ed.2d 57 (1979), the Court reviewed, *inter alia,* the sufficiency of one count of plaintiffs' complaint which contained allegations that the park district, a unit of local government, had agreed with a private-party potential concessionaire that said concessionaire would make an economically unrealistic proposal for concession rights at five municipal golf courses. Plaintiffs, who had been concessionaires at the golf courses, alleged that the proposal was used to coerce them into a five percent sales taxing, and a price raising/fixing scheme. Plaintiffs alleged that they refused to be coerced and subsequently lost their leases and concessions. Thereafter the co-conspirator concessionaire was awarded concession rights at all five golf courses.

The concessionaire defendant invoked *Noerr-Pennington* immunity, claiming that its role in the case was nothing more than that of a successful bidder. The *Kurek* Court distinguished the decision in *Metro Cable Company v. CATV of Rockford, Inc.,* 516 F.2d 220 (7th Cir. 1975), and concluded that if plaintiffs could prove their allegations, *Noerr-Pennington* would provide no defense. First, the *Kurek* Court found that the actions of the concessionaire in presenting the proposal knowing that it would be used by the park district to coerce plaintiffs into conduct violative of the antitrust laws were "not essentially dissimilar to activities the Sherman Act was meant to proscribe." 557 F.2d at 593.

Second, the Court observed the following:

> Nor is the fact that [the concessionaire] combined or conspired with governmental officials dispositive, for both of *Noerr's* premises with respect to that point are undercut by the factual setting of this case. Our determination that the Park District and its officials had no state mandate or authority to engage in the activities attacked here necessarily reduces the applicability of the reasoning of *Noerr* to the degree it is based on the need of governmental units for citizen input in making decisions

> that *Parker* holds to be outside the scope of the Sherman Act. *See Duke & Company Inc., supra,* 521 F.2d at 1282. The *Noerr* decision also rests on a refusal to impute to Congress an intent to invade the constitutional 'right of the people . . . to petition the Government *for a redress of grievances.*' . . . We have some difficulty understanding how a contract proposal to a governmental unit falls within the ambit of that right, . . . but even if it does, we think it clear that the agreement with government officials to pressure others into an antitrust violation does not.

Id. at 593-94 (emphasis in original). As a third reason for inapplicability of *Noerr-Pennington,* the Court concluded that plaintiffs possibly could prove that the concession proposal was a mere sham. *Id.* at 594.

Other courts have indicated that the participation of a public official in an illegal conspiracy precludes relief pursuant to the *Noerr-Pennington* doctrine. For example, in overruling an earlier decision of the same court and thereby granting defendants' motions for summary judgment, the Court in *In re Airport Car Rental Antitrust Litigation,* 521 F.Supp. 568 (N.D.Cal.1981), observed that the sham exception to the *Noerr-Pennington* doctrine "may apply where the public officials are themselves participants in the conspiracy." *Id.* at 588 (citation omitted). Plaintiff, a car rental company, alleged that two other car rental companies

> engaged in a conspiracy to eliminate competition in the on-airport rental market and, in furtherance of that conspiracy, jointly influenced and engaged with airport authorities to adopt and enforce certain standards . . . regarding eligibility. . . . [Plaintiff] alleged that those standards and requirements precluded it from competing in the on-airport car rental market [in certain cities]. [Plaintiff] also alleged that defendants entered into contracts with airport authorities which prohibited other car rental operations from entering the . . . market and established unreasonably high minimum guarantees, that they opposed applications of other car rental companies

> in bad faith, and that they fixed rental rates in the on-airport market.

Id. at 589 (footnote omitted).

The Court then reviewed the evidence relevant to *Noerr-Pennington* that plaintiff had presented in opposition to defendants' motion for summary judgment:

> Plaintiff . . . offers evidence said to show that defendants' representatives coordinated their negotiations with the Port . . . and met jointly with Port officials to discuss the terms of the lease agreements . . . and to present standards and criteria which the Port should require of lessees, including minimum guarantees. . . . Among the terms discussed were concession fees, . . . [and] criteria which a company should have to meet to provide airport service. . . . Finally, defendants participated in a series of meetings with Port officials in which they unsuccessfully opposed on economic grounds the entry of additional car rental companies into the on-airport market.

Id. at 588. The Court then summarized what plaintiff had demonstrated by its evidence and concluded that *Noerr-Pennington* was applicable:

> a trier of fact could find that defendants, separately and jointly, negotiated with the Port over the various terms of the lease agreements which, as finally executed, required car rental companies . . . to meet certain qualifications and pay guaranteed minimum fees, but did not preclude the Port from entering into such agreements with other companies. Even if . . . the terms for which defendants negotiated were favorable to them and unfavorable to plaintiff and served to delay plaintiff's entry into this market . . . these facts, if they state a claim cognizable under the Sherman Act at all, prove nothing other than a classic case for application of the *Noerr-Pennington* doctrine.

Id. at 588-89 (emphasis in original).

This Court acknowledges that *Noerr-Pennington* as applied in the adjudicatory setting permits closer scrutiny of activities than in the legislative setting and allows denial of immunity for actions which would be condoned in the context of the legislative process. *See, e.g., California Motor Transport Company v. Trucking Unlimited,* 404 U.S. 508, 513, 92 S.Ct. 609, 613, 30 L.Ed.2d 642 (1972). Those considerations, however, do not preclude the Court from referring to decisions involving adjudicatory processes, for the analyses involved in those decisions can be instructive for the legislative context.

In *Mason City Center Associates v. City of Mason City, Iowa,* 468 F.Supp. 737 (N.D. Iowa 1979), plaintiff alleged that private developers entered into an agreement with the city to plan a downtown center on the express condition that the city would prevent any person or firm from planning or constructing a regional shopping center that would compete with the downtown center. Plaintiffs sought to construct a center on a tract of land which required rezoning. The city zoning commission denied the application for rezoning and the denial was affirmed by the city council. Plaintiffs alleged that the denial was pursuant to, and in furtherance of, the council members' agreement with the private developers. In denying defendants' motion to dismiss for failure to state a claim, which was based, *inter alia,* on the state action exemption of *Parker,* and the *Noerr-Pennington* doctrine, the Court concluded the following with regard to the applicability of *Noerr-Pennington:*

> to the extent this case presents allegations that the private developers entered into an anticompetitive agreement *with* the City of Mason City and its Council permanently to exclude competing developers from the relevant market, it raises at least one important factual issue relating to defendants' possible intent or purpose to deprive plaintiffs of any meaningful access to the City's zoning mechanisms and procedures. *See, e.g., California Motor Transport Co. v. Trucking Unlimited,*. . . . On that basis

> alone this case is distinguishable from *Noerr* and *Pennington.*

Id. at 745 (emphasis in original)[26]

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26. The *Mason City Center* Court held that a more complete factual record had to be developed before the Court could determine whether *"Noerr-Pennington* political-speech immunity" would preclude plaintiffs' claim. *Mason City Center Associates v. City of Mason City, Iowa,* 468 F.Supp. 737, 745 (N.D. Iowa 1979). The facts of the *Mason City Center* case indicate that the Court therein was analyzing an adjudicatory rather than a legislative process. Further, the Court's reference to "access barring" indicates that the analysis was of an adjudicatory process, inasmuch as most courts have confined the use of that term and concept to an adjudicatory rather than a legislative/executive setting. *See, e.g., California Motor Transport Company v. Trucking Unlimited,* 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); *Mark Aero, Inc. v. Trans World Airlines,* 580 F.2d 288 (8th Cir. 1978); *Federal Prescription Service, Inc. v. American Pharmaceutical Association,* 484 F.Supp. 1195 (D.D.C.1980); *Wilmorite, Inc. v. Eagan Real Estate, Inc.,* 454 F.Supp. 1124 (N.D.N.Y.1977), *aff'd,* 578 F.2d 1372 (2d Cir. 1978), *cert. denied,* 439 U.S. 983, 99 S.Ct. 573, 58 L.Ed.2d 655 (1978). *Cf. Metro Cable Company v. CATV of Rockford, Inc.,* 516 F.2d 220, 231-32 (7th Cir. 1975) (Court engaged in an analysis of "access-barring" in the context of the legislative process).

Although "access-barring" well might constitute an appropriate method of analysis in cases involving legislative action, this Court need not engage in such an analysis in order to reach the conclusion that the facts herein bring the instant cause within the co-conspirator exception. This Court, however, finds the *Mason City Center* reasoning particularly instructive in spite of the different context and the different method by which that Court reached its result. Two reasons exist for this Court's reliance on the *Mason City Center* reasoning concerning the co-conspirator exception: (1) the function of the city council in that case in affirming the action of the zoning commission was very similar to the function of the Houston City Council during the franchising process; and (2) in support of its decision about the applicability of *Noerr-Pennington,* that Court cited several cases involving the legislative/executive context as well as those it cited wherein the alleged scheme had involved the courts or administrative bodies. Although the standard for determining whether certain activities involving the courts or administrative decisionmakers constitute corruption of those bodies is less strict than the standard which is applied to similar activities designed to induce legislative action, corruption of legislative bodies is not eliminated as a consideration when a court must decide whether *Noerr-Pennington* applies.

In *Federal Prescription Service, Inc. v. American Pharmaceutical Association,* 484 F.Supp. 1195 (D.D.C.1980), a mail order pharmacy alleged that the national association of pharmacists, the only defendant, acting alone or in concert with various named co-conspirators pursuant to anticompetitive policies established by its House of Delegates, restrained plaintiff's interstate sale of prescription drugs by mail. The Court found that the "state agency that sanctioned or initiated [various] anti-competitive activities had, through its membership, consistently expressed economic allegiance to [the association] and opposition to mail order." *Id.* at 1209. Observing that the conduct of administrative officials is subject to closer scrutiny than that of state legislators, and that conduct is less protected when the focus of administrative decisionmaking shifts to discretionary judgments concerning commercial considerations, the Court concluded that "[b]ecause the . . . Board itself was part of the illegal conspiracy its administrative processes could not be invoked or applied fairly . . . with respect to [plaintiff's business]." Further, the Court found that, "as a consequence the challenged Board action is tainted as a sham." *Id.* at 1209 (citations omitted).

In *Israel v. Baxter Laboratories, Inc.,* 466 F.2d 272 (D.C. Cir. 1972), plaintiffs asserted

> that the defendants conspired to keep plaintiff's drug . . . off the interstate market and out of competition with . . . a similar drug sold by defendants Baxter and Travenol, by influencing the Food and Drug Administration to deny fair consideration of the new drug applications filed by plaintiffs. . . . that defendants (who include an official of the FDA) carried out this conspiracy by suppressing, concealing and misconstruing information concerning the two drugs before the FDA; by arranging for the employment as a consultant to the FDA of a medical doctor who had a financial interest in Baxter, . . .; by applying an unfair standard in judging [plaintiffs' drug]; and by misrepresenting the safety and efficacy of [plaintiffs' drug].

Id. at 274.

In the context of defendants' *Noerr-Pennington* contentions, the Court observed that plaintiffs had alleged "that the real purpose of defendants' joint efforts is to preclude, not induce, fair FDA consideration of the safety and efficacy of plaintiffs' drug . . ., and as such should be viewed as falling within the 'sham' exception to *Noerr-Pennington.*" *Id.* at 279. Pursuant to its obligation to take all of the allegations in the complaint as true, the Court remanded all issues to the district court.

Having analyzed the above-identified decisions and compared the facts thereof to the evidence presented in the instant cause, the Court concludes that the co-conspirator exception to *Noerr-Pennington* is applicable herein to deny immunity to Gulf Coast. The activities of the Mayor, various members of City Council and employees of the City amply demonstrate that the Houston franchising process involved more than successful petitioning efforts by private parties who persuaded public officials to support them. The evidence herein reveals active participation, and orchestration by public officials in an anticompetitive agreement.

In asserting that *Noerr-Pennington* immunity applies to the facts of this case, defendants rely primarily on the decision in *Metro Cable Company v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975). This Court perceives as necessary a detailed analysis of that case in order to demonstrate that the ruling therein is not dispositive of the finding by this Court that the co-conspirator exception precludes the applicability of *Noerr-Pennington.*

The Seventh Circuit affirmed the dismissal of plaintiff's second amended complaint on the basis of the *Noerr-Pennington* doctrine. Plaintiff, a cable television company which applied for and failed to receive a franchise in Rockford, sued the following: (1) the company which did get the franchise, CATV; (2) CATV's affiliate which operates WCEE-TV in Rockford; (3) four individuals associated with those companies; and (4) the mayor and an alderman of the city. In substance, plaintiff alleged the following:

> WCEE-TV and its officers planned to obtain the exclusive cable television franchise in Rockford; organized a com-

> pany, CATV, for that purpose; induced the mayor and an alderman to oppose plaintiff's application by making a campaign contribution to each of those officers; and succeeded, with the help of the mayor and the alderman, in persuading the city council not only to award the franchise to CATV but to refuse plaintiff's successive applications without affording plaintiff a hearing.

516 F.2d at 224.

Having recounted the material facts and analyzed the reasoning of the major Supreme Court decisions pertinent to the immunity issue before it, the Seventh Circuit concluded that those decisions could be synthesized as follows:

> The Sherman Act does not apply to otherwise valid governmental action that results in a restraint of trade or monopoly. *Parker v. Brown*. Nor does the Sherman Act apply to concerted efforts to induce government to take such lawful action, if those efforts are genuine. *Noerr*. Such efforts constitute political activities which Congress did not intend to regulate by the Sherman Act. This is true even though the purpose and effect of the concerted activities is to eliminate competition. *Noerr*; *Pennington*. When the concerted activities occur in a legislative or other non-adjudicatory governmental setting, they are not within the Sherman Act even though they include 'conduct that can be termed unethical,' such as deception and misrepresentation. *Noerr*; *Pennington*. This is true even when the concerted efforts are 'part of a broader scheme itself violative of the Sherman Act.' *Pennington*. When, however, the concerted activities occur in an adjudicatory setting, unethical conduct that would not result in antitrust illegality in a legislative or other non-adjudicatory setting may demonstrate that the defendants' activities are not genuine attempts to use the adjudicative process legitimately and may therefore result in illegality, including illegality under the antitrust laws. (This is 'the "sham" exception in the *Noerr* case, as adapted to the adjudica-

> tory process.' 404 U.S. at 516, 92 S.Ct. at 614.) *California Motor Transport*.

Id. at 227-28 (emphases in original).

The Court then discussed the plaintiff's allegations that the mayor and the alderman had participated as co-conspirators and determined that such allegations would not suffice to take the case outside of the scope of *Noerr-Pennington*. Distinguishing *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1942) by finding that the case before it was not one "in which the agency of the government itself is alleged to be part of the conspiracy . . .", 516 F.2d at 229, and recognizing that *Pennington* involved the act of a public official who was not claimed to be a co-conspirator, the Seventh Circuit concluded that, even in light of plaintiff's allegation that the mayor and alderman had received substantial sums as campaign contributions in exchange for their support:

> Nothing in the *Noerr* opinion or any other case of which we are aware suggests any reason for believing that Congress, not having intended the Sherman Act to apply to combined efforts to induce legislative action, did intend the Act to apply if a member of the legislative body agreed to support those efforts.

Id. at 230 (emphasis in original).

This Court acknowledges that the franchise applicants in Houston could have conspired among themselves to petition the City for legislative action favorable to them even if their purpose had been to eliminate or limit competition from others not subscribing to their joint efforts. The evidence before this Court, however, encompasses much more than such petitioning activities on the part of private parties. Indeed, said evidence presents more than public officials' mere support of the efforts of private parties, public officials' unethical conduct, or the alleged participation of public officials in a conspiracy simply through their influence in favor of private parties on the legislative body taking the action. The evidence presented herein demonstrates clearly that the Mayor and the City itself, through the conduct of its agents and employees, not only

supported the lobbying efforts of Gulf Coast and communicated with applicants about franchise terms, *see In re Airport Car Rental Antitrust Litigation, supra*, at 589, but also manipulated certain aspects of the conspiracy. The facts of this case exceed those considered by the *Pennington* and *Metro Cable* courts; for, herein are presented not only allegations but proof by a preponderance of the evidence that a public official and a governmental entity actively conspired with private participants in violations of the Sherman Act.[27]

B. State Action Exemption and Legislative Process Immunity

Two corollary doctrines which could be relied upon by the governmental defendants are the state action exemption derived from *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1942) and its progeny, and legislative process immunity derived from such decisions as *Duke & Company, Inc. v. Foerster*, 521 F.2d 1277 (3rd Cir. 1975). With regard to immunity arising out of public officials' functioning within the legislative process, the jury was instructed, in part, as follows:

> Lawful activities of such a legislative body, or lawful activities of individual members of such a legislative body, or of employees providing administrative assistance to such a legislative body are not activities prohibited by the antitrust laws when such lawful activities are part of or occur in the course of the legislative process.

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27. In *Parmelee Transportation Company v. Keeshin*, 292 F.2d 794 (7th Cir. 1961) the Court affirmed the district court's granting of defendants' motions for summary judgment, finding, *inter alia*, that plaintiff's allegation that wrongful conduct on the part of a member of the Interstate Commerce Commission facilitated plaintiff's competitor in receiving a monopoly baggage-transfer contract from the railroads did not allege a violation of the antitrust laws. The Court in *Cow Palace, Ltd. v. Associated Milk Producers, Inc.*, 390 F.Supp. 696 (D.Colo. 1975), granted defendant's motion to dismiss, finding that plaintiff's allegation that the alleged conspiracy included representatives of the United States government was insufficient to preclude applicability of *Noerr-Pennington* because the Ninth Circuit had disapproved its decision in *Harman v. Valley National Bank of Arizona*, 339 F.2d 564, a case primarily relied upon by plaintiff.

Instruction No. 19. In answering Interrogatory No. 3 affirmatively, and finding in Interrogatory No. 4 that the City and McConn were liable, the jury clearly determined that the acts committed by or on behalf of those defendants were outside of the scope of the legislative process.

This Court concludes that the record amply supports that jury finding. The *Duke* Court observed that the proposition that "*Noerr-Pennington* immunity covers a state governmental entity which 'listens to anticompetitive pleas' [d]oubtlessly . . . is correct so long as the public body acts within its legal discretion and in what it considers the public interest." 521 F.2d at 1282. This Court's analysis below of the requisites of the *Parker* state action exemption demonstrates that pursuant to state law, the City of Houston had the right not only to engage in the cable television franchising process, but also to award franchises. That authority alone, however, does not suffice to meet the standard prescribed by the *Duke* Court.

What becomes most strikingly apparent in the record of the Houston franchising process is that the interests of or benefits to the citizens of Houston who would receive cable television services was of minimal, if any, concern to the Houston City Council or to the Mayor. The council's unwillingness to assess the applications prior to approving them cannot be characterized as being in the public interest. Further, the acts of members of council and the Mayor are not deemed by this Court to be either within the intent of the State legislature or within the actors' legal discretion. Thus, the criteria for legislative process immunity are not satisfied. Further, inasmuch as the evidence clearly reveals that McConn acted outside of the scope of his responsibilities as a city official by actively participating in the agreement to ensure the failure of non-conspirators, this Court is compelled to deny him any individual immunity.

In *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1942), the Supreme Court held that the antitrust laws were not intended to apply to state action, thus creating an exemption for certain state decisions and actions resulting in restraint of trade or monopoly. The *Parker* doctrine as well exempts

"anticompetitive conduct engaged in as an act of government by . . . subdivisions [of the State], pursuant to state policy to displace competition with regulation or monopoly public service." *Lafayette v. Louisiana Power & Light Company*, 435 U.S. 389, 413, 98 S.Ct. 1123, 1136, 55 L.Ed.2d 364 (1978). The City raised the *Parker* state action doctrine in various pretrial motions, but has not reurged its applicability in the post-trial motions now being considered. The Court, however, deems necessary an analysis of the City's position pursuant to *Parker* because a synthesis of the many decisions reviewed hereinabove indicates that a relationship exists between the availability of *Noerr-Pennington* immunity and the validity of the state, or state subdivision, action involved.

The *Parker* Court reserved the question of the availability of its exemption when the governmental entity itself is alleged or proven to be a co-conspirator with private parties: "[W]e have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade, ..." *Parker*, 317 U.S. at 351-52, 63 S.Ct. at 314. Various courts have emphasized that unresolved issue of *Parker* in analyzing the applicability of *Noerr-Pennington* political activity immunity. *See, e.g., Kurek v. Pleasure Driveway & Park District of Peoria, Illinois, supra*; *Duke & Company v. Foerster, supra*; *but see, Harman v. Valley National Bank of Arizona, supra*, wherein the Court observed that making "Sherman Act liability depend upon ultimate resolution of often difficult questions of law and fact relating to the validity or propriety of solicited governmental action 'would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade' and 'would raise important constitutional questions' . . . ." *Id.* at 566, quoting *Noerr*, 365 U.S. at 137-38, 81 S.Ct. at 529-530; *In re Airport Car Rental Antitrust Litigation, supra.*

The *Noerr* Court itself observed that "where a restraint upon trade . . . is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." 365 U.S. at 136, 81 S.Ct. at 529, citing *United States v. Rock Royal Co-op, Inc.*, 307 U.S. 533, 59

S.Ct. 993, 83 L.Ed. 1446; *Parker v. Brown, supra.* Further, the dual underpinnings of the *Noerr* decision demonstrate the Supreme Court's recognition of the interplay between the government's right to represent the people and its concomitant need to receive information from its constituency, and the people's right freely to inform the government of their wishes. *Noerr,* 365 U.S. at 137 & n.17, 81 S.Ct. at 529 & n.17. Thus, *Noerr* was based not only on First Amendment considerations, but also on the concept confirmed in *Parker. See, e. g., Wilmorite, Inc. v. Eagan Real Estate, Inc.*, 454 F.Supp. 1124, 1136 (N.D.N.Y.1977), *aff'd*, 578 F.2d 1372 (2d Cir. 1978), *cert. denied*, 439 U.S. 983, 99 S.Ct. 573, 58 L.Ed.2d 655 (1978).

The Third Circuit, in *Duke & Company v. Foerster*, 521 F.2d 1277 (3rd Cir. 1975), reasoned as follows:

> *Parker* reserved judgment on such an alleged combination of public and private entities. After *Goldfarb*, however, it is clear that when there is an allegation of governmental participation in such a combination to the benefit or detriment of private parties, and when the activities of the public body are not compelled by the state acting as sovereign, a claim has been stated under the antitrust laws. No protection is afforded to such a combination under the doctrine of *Noerr-Pennington.*

Id. at 1282 (emphasis in original). In finding that plaintiff's allegations that two public officials had participated in a conspiracy in violation of the Sherman Act were insufficient to preclude applicability of *Noerr-Pennington*, the Seventh Circuit, in *Metro Cable*, observed that the case before it was not one "in which the agency of government itself is alleged to be part of the conspiracy, the question reserved in *Parker v. Brown. . . .*" *Metro Cable Company v. CATV of Rockford, Inc.*, 516 F.2d 220, 229 (7th Cir. 1975).

This Court interprets the decisions rendered pursuant to the authority of *Noerr, Pennington* and *Parker* as suggesting the following result. When a restraint of trade is the result of valid governmental action which was induced by the joint efforts of

private parties, those joint efforts are shielded by *Noerr-Pennington* immunity. When, however, the governmental action is rendered invalid by the illegal, not merely unethical, conduct of the governmental entity acting as a co-conspirator, the joint efforts of the private parties are not automatically entitled to immunity. Further, inasmuch as the governmental entity can act only through its agents, who are public officials, the illegal acts of those officials in their official capacities become the illegal acts of the entity.

If participation of the entity in a conspiracy taints the petitioning process, the same conduct of the entity's agents necessarily must taint the process. Where municipalities, or their agents acting in official capacities, are proven, along with private parties, to have engaged in a conspiracy in restraint of trade, the result is that the actions which the private parties sought to induce were unlawful and therefore rendered at least invalid if not non-governmental. *See In re Airport Car Rental Antitrust Litigation, supra*, at 587 where the Court made the following observation:

> This is not a case in which the agencies themselves are charged with having engaged in activities violating the antitrust laws. It must be distinguished from the cases in which the municipalities along with private parties were alleged to have engaged in exclusionary activities. . . . In those cases the governmental character of the activity under *Parker v. Brown* and *Lafayette* was critical to the application of the antitrust laws to the public agencies. No such issue is present here. Plaintiff has made no showing that the public agencies' actions defendants sought to induce were, or would have been unlawful in themselves and therefore not governmental.

Id. at 587 (citations and footnote omitted).

The *Noerr* Court found that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Noerr*, 365 U.S. at 136, 81 S.Ct. at

529. In part, the Court so concluded because a contrary interpretation of the Act "would substantially impair the power of government to take actions through its legislature . . . that operate to restrain trade", *id.* at 137, 81 S.Ct. at 529, for the reason that governments acting on behalf of the people rely on the people being able freely to inform the government of their wishes. Thus, the *Noerr* Court established a nexus between the exemption for valid governmental actions in restraint of trade pursuant to *Parker* and the people's protected right to petition the government for such actions pursuant to *Noerr*, and subsequently *Pennington*.

In the case before this Court, the awarding of the franchises is a power accorded to the Houston City Council pursuant to State law, and that ultimate action is not challenged. That ultimate action was not rendered non-governmental by the actions of defendants herein. The conduct of defendants during the franchising process, however, was illegal, and, therefore, this Court concludes that the legislative action sought by the private parties was rendered invalid by that illegal conduct. Accordingly, the first underpinning of *Noerr* is weakened; the participation of the public officials in the illegal conspiracy resulted in the private parties' petitioning to induce invalid governmental action. The circumstances of this case do not present the unfairness to petitioning parties, or the uncertainty of result for persons attempting to persuade governmental bodies that concerned the courts in *Harman v. Valley National Bank of Arizona, supra*, at 566, and *In re Airport Car Rental Antitrust Litigation, supra*, at 586. This Court perceives no injustice in depriving Gulf Coast of *Noerr-Pennington* immunity on facts which demonstrate not only that public officials actively participated in an illegal conspiracy but also that the private parties involved were aware of and sought such participation.

Defendants have asserted that the two doctrines, *Parker* and *Noerr-Pennington*, are not interdependent. That view finds support in the decisions rendered by the *Harman* Court and the *In re Airport Car Rental Antitrust Litigation* Court. This Court, however, believes that the concerns of those courts are

not instructive of the circumstances of this case, as explained hereinabove. Further, defendants' assertion does not satisfactorily consider the unresolved question in *Pennington* regarding a public official who is alleged to be a co-conspirator. As this Court has explained previously, the conduct of a public official acting in his or her official capacity becomes the conduct of the entity. Accordingly, the unresolved question in *Pennington* can be viewed, in certain circumstances, as coextensive with the question reserved by the *Parker* Court concerning the import of co-conspirator activities on the part of a state or its municipality. *See Parker*, 317 U.S. at 351-52, 63 S.Ct. at 313-314.

Even if defendants are correct, however, the determination of whethe municipal action is exempt from antitrust liability pursuant to *Parker* is pertinent to whether the private parties seeking such action may invoke *Noerr-Pennington* immunity. Assuming that *Noerr-Pennington* immunity for private parties is not contingent on the governmental action's being exempt pursuant to *Parker*, at the very least, the involvement of public officials in an illegal agreement "reduces the applicability of the reasoning of *Noerr* to the degree it is based on the need of governmental units for citizen input in making decisions that *Parker* holds to be outside the scope of the Sherman Act." *Kurek v. Pleasure Driveway & Park District of Peoria, Illinois, supra*, at 593.

Accordingly, this Court engages in the following analysis of the state action exemption pursuant to *Parker* to demonstrate that the City's actions during the franchising process are not encompassed by that exemption.[28]

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28. An unresolved question exists regarding whether the *Parker* doctrine "would protect not only the state itself, but private parties acting under state mandate." *United States v. Southern Motor Carriers Rate Conference, Inc.*, 467 F.Supp. 471, 479 (N.D.Ga.1979). *See Cantor v. Detroit Edison Company*, 428 U.S. 579, 594-95, 96 S.Ct. 3110, 3119-3120, 49 L.Ed.2d 1141 (1976)(plurality opinion) wherein the Court left open the availability of a *Parker* exemption to private parties in "cases in which the State's participation in a decision is so dominant that it would be unfair to hold a private party responsible for his conduct in implementing it, ..." *Id.* at 594-95, 96 S.Ct. at 3119. In this case, Gulf Coast has not contended that it is entitled

Pursuant to *Lafayette v. Louisiana Power & Light Company, supra*, a subdivision of the State, such as the City of Houston, may claim exemption from antitrust liability on the authority of *Parker*. Inasmuch as "subordinate units of [state] government . . . are not entitled to all of the federalistic deference that the state would receive", *Kurek v. Pleasure Driveway & Park District of Peoria, Illinois, supra*, at 589, courts have engaged in case-by-case analyses to determine the applicability of the state action doctrine to various governmental actions or laws and certain tests have emerged. *See, e. g., California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980); *Lafayette v. Louisiana Power & Light Company, supra; Cantor v. Detroit Edison Company*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976).

The decisions reveal that different standards have been applied to private parties claiming state action exemption and to municipalities claiming such exemption from antitrust liability. *Compare Cantor v. Detroit Edison Company, supra with Lafayette v. Louisiana Power & Light Company, supra*. Any assertion that Gulf Coast would have made regarding the applicability to it of *Parker* immunity clearly would have been foreclosed by the requirement that a private party must show that anticompetitive activities were "compelled by direction of the State acting as a sovereign." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791, 95 S.Ct. 2004, 2015, 44 L.Ed.2d 572 (1975); *see also, Cantor v. Detroit Edison Company, supra; United States v. Southern Motor Carriers Conference, Inc.*, 467 F.Supp. 471, 481-83 (N.D.Ga.1979); *cf. California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., supra*, 445 U.S. at 105, 100 S.Ct. at 943 (in deciding that the state plan for wine pricing was not protected state action, the Court

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to an exemption pursuant to *Parker*. The Court, however, briefly has analyzed the decisions pertaining to the *Parker* exemption for private parties in order to demonstrate that Gulf Coast could not have availed itself of that exemption on the record developed at trial. Refer to discussion at 1026-1027, *supra*.

articulated a two-pronged standard for *Parker* antitrust immunity: "the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy' [and] the policy must be 'actively supervised' by the State itself.") *Id.* at 105, 100 S.Ct. at 943, quoting *Lafayette v. Louisiana Power & Light Company, supra*, 435 U.S. at 410, 98 S.Ct. at 1135, 100 S.Ct. at 943. Thus, on the facts of the instant case, Gulf Coast could not have satisfied the standard of *Goldfarb* or of *California Liquor. See also Guthrie v. Genesee County, New York*, 494 F.Supp. 950, 958 (W.D.N.Y. 1980) ("if the County itself cannot claim to be 'exempt' from the antitrust laws by virtue of its status, the *a fortiori* [the private party] has no greater claim to the state action exemption . . ., especially since it is alleged that [the private party] and the County . . . have engaged in the same conduct.") *Id.* at 958 (emphasis in original); *cf. Wiggins Airways, Inc. v. Massachusetts Port Authority*, 362 F.2d 52, 56(1st Cir. 1966), *cert. denied*, 385 U.S. 947, 87 S.Ct. 320, 17 L.Ed.2d 226 (1966). (In deciding that the Authority was an instrumentality of the government and exempt pursuant to *Parker*, the Court remarked as to the private-party defendants that "If, as we have found, the Authority's conduct was lawful here, it would be an unreasonable restriction on its freedom to hold that the other defendants acted illegally in having aided it." *Id.* at 56).

The determination of whether the City of Houston, as a subordinate unit of State government, would be entitled to an exemption pursuant to *Parker* requires more comprehensive analysis. The *Lafayette* Court concluded that only anticompetitive conduct that is engaged in by a subdivision of the state pursuant to state policy is exempted by the *Parker* doctrine. *Lafayette v. Louisiana Power & Light Company, supra*, 435 U.S. at 413, 98 S.Ct. at 1136. The Court also emphasized that the state policy must be one "clearly articulated and affirmatively expressed" as such, and that the implementation thereof must be "actively supervised" by the state as policymaker, *id.* at 410, 98 S.Ct. at 1135. The state subdivision, however, need not be able "to point to a specific, detailed legislative authorization", *id.* at 415, 98 S.Ct. at 1138. Instead, "an adequate

state mandate for anticompetitive activities of cities . . . exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.' " *Id.* at 415, 98 S.Ct. at 1138, quoting the Fifth Circuit Court of Appeals in the decision below, 532 F.2d 431, at 434.

Pursuant to Article 11, Section 5 of the Texas Constitution, Houston is a home rule city. In Texas, a home rule city has " 'full power of self-government, that is, full authority to do anything the legislature could theretofore have authorized [it] to do.' " *Lower Colorado River Authority v. City of San Marcos*, 523 S.W.2d 641, 643 (Tex.Sup. Ct.App.1975), quoting *Forwood v. City of Taylor*, 147 Tex. 161, 214 S.W.2d 282. Accordingly, the legislature does not make grants of power to such cities; however, limitations on their powers may derive from general law, the Constitution or the city charter.

As defendant City has pointed out with regard to cable television franchising,

> The power of franchise cable television clearly falls within the plenary power granted to the City of Houston under the home rule city amendment. There are no legislative limitations proscribing the power of home rule cities to franchise cable television. In fact, the legislature of the State of Texas has codified this power with an express grant to home rule cities of full franchising power. Tex.Rev. Civ.Stat. Art. 1175, § 12 and Art. 1181. The only proscription on cable television franchising is set forth by the Texas Constitution which provides that franchises must be non-exclusive and non-perpetual. Texas Constitution, Art. 1 § 17.

The absence of legislative limitations on home rule cities' powers to grant franchises, and even the full power of self government with regard to all matters not otherwise limited cannot render the City of Houston's actions with regard to the cable television franchising process equivalent to those of the state for purposes of a *Parker v. Brown, supra*, exemption from antitrust liability. The "court must examine the state

statute which purportedly contains the authorization for the anticompetitive conduct . . ." *Guthrie v. Genesee County, New York, supra*, at 955, particularly because "where there are numerous subordinate units of government of a given type, each of the same status under state law, it is more difficult to say that the actions of any one of them are undertaken pursuant to 'the state['s] command,' . . . or that '[t]he state . . ., as sovereign' imposed any anticompetitive restraints resulting from such actions."[29] *Kurek v. Pleasure Driveway & Park District of Peoria, Illinois, supra*, at 589, quoting *Parker v. Brown, supra*, 317 U.S. at 352, 63 S.Ct. at 314.

The various statutes and constitutional provisions applicable to the cable television franchising issue herein demonstrate no intent on the part of the Texas legislature that the franchising process in home rule cities is to be anticompetitive. The award in other Texas cities of one franchise covering the entire city, rather than multiple, non-overlapping franchises, does not belie this Court's assessment of the legislative intent. The plaintiff's expert testified that such awards were the results of vigorous competition during the franchising processes.

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29. Home rule cities in Texas include those with populations of 5000 or more, Art. 11, § 5, Texas Constitution, and the Court assumes that numerous cities of that size exist in the State. Plaintiff's expert witness testified that other cities in Texas have engaged in cable television franchising processes different from the process in Houston. As a result of the competition inherent in those franchising processes, the expert testified that the benefits to the citizens of those cities were greater than any benefits derived in Houston.

In light of the number of home rule cities and the various ways in which each could implement or has implemented the statutory franchising authority, the Court can conclude that the Texas legislature intended for home rule cities to have freedom to decide how best to conduct the franchise process. That intent, however, is far afield from the intent urged upon the Court by the City defendant's invocation of *Parker* immunity: that the City of Houston's decision to engage in an anticompetitive process was equivalent to an affirmatively expressed state policy, or was sanctioned by the legislature. This Court declines to decide that the State's grant of full powers of self-government to home rule cities must be viewed as a legislative grant to Houston to implement a "state policy" requiring not only restraint of trade in cable television franchising but also participation of Houston public officials in a conspiracy to restrain trade.

None of the pertinent provisions or statutes reveals clearly and affirmatively an intent to displace "competition with the kind of regulation and monopoly service contemplated by the Supreme Court under the 'state action' doctrine." *Mason City Center Associates v. City of Mason City, Iowa*, 468 F.Supp. 737, 746 (N.D. Iowa 1979). Further, none of the cited provisions indicates that the State actively supervises the implementation of any anticompetitive policy addressed to franchising, even if such a policy could be said to exist. To the contrary, Article 1181 of the Texas statutes gives the exclusive power and authority to make a grant of such a franchise to the governing authority of the home rule city.

The Court concludes that "the numerosity and potential variety of [franchising] practices of [home rule cities] . . . suggest that 'the State's policy is neutral' on any given [franchise] practice and that there is no 'statewide program' which would require the sort of comity-based respect evident in *Parker*." *Kurek v. Pleasure Driveway & Park District of Peoria, Illinois, supra*, at 590, citing *Cantor v. Detroit Edison Company, supra*, 428 U.S. 579, at 585, 96 S.Ct. at 3115 (emphasis in original).

> [A]bsent state authority which demonstrates that it is the intent of the state to restrain competition in a given area, *Parker*-type immunity . . . may not be extended to anti-competitive government activities. Such an intent may be demonstrated by explicit language in state statutes, or may be inferred from the nature of the powers and duties given to a particular government entity.

Duke & Company, Inc. v. Foerster, supra, at 1280 (emphasis in original).

Nothing in the legislative enactments reviewed by this Court indicates either explicitly or implicitly that the intent of the State is either to restrain competition in the cable television franchising process or to direct home rule cities to do so. Nor do the pertinent provisions reveal that the legislature contemplated the kind of activity complained of and proven herein. *See, e. g., Guthrie v. Genesee County, New York, supra.*

Accordingly, the Court concludes that the state action exemption doctrine of *Parker* and its progeny is unavailable to the City and to McConn, *see, e. g., Duke & Company, Inc. v. Foerster, supra*, as well as being unavailable to Gulf Coast.

VI. Conclusion

For the reasons stated hereinabove, the Court hereby orders the following:

(1) plaintiff's Motion for Injunctive Relief and for Entry of Judgment in Accordance with the Verdict is denied;

(2) plaintiff's Motion for Leave to File its Second Amended Complaint is denied;

(3) defendants' motions for judgment on verdict or for new trial are denied; and

(4) defendants' motions for judgment notwithstanding the verdict are granted.

Counsel will present an appropriate final order for entry by the Court within twenty (20) days hereafter.

Office-Supreme Court, U.S.
FILED
JAN 15 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-951

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

GULF COAST CABLE TELEVISION CO.,
Petitioner,

v.

AFFILIATED CAPITAL CORP.,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the *Noerr-Pennington* doctrine prevents antitrust liability for an agreement between applicants for cable franchises not to compete on franchise terms, when a municipal official actively participated to include a personal business associate in the deal.

2. Whether the *Noerr-Pennington* doctrine should immunize all communications with a municipal official, even when those communications facilitate unlawful conduct by the municipality.

II

PARTIES TO THE ACTION

Respondent is Affiliated Capital Corp. It is affiliated with the following entities:

ACRG Joint Venture
Affiliated Oak Venture
Atrium at Beltway II
Beechnut Place Apartments Phase I
Beechnut Place Apartments Phase II
Bellaire-Ashford Apartments
Braesridge Apartments
Braesridge 305 Associates
Colony Creek, Ltd.
FM149 Venture
Fairdale Building Venture
Fondren Glen Apartments
Fondren Village Apartments
Goldberg, Inc.
Greater Houston Center Development Corporation
Greater Southwest Office Park
Pinnacle/Affiliated Joint Venture
Ransom Properties
River Park, Ltd.
Rolling Creek Joint Venture
Southwest Crossing Venture
Southwest Houston Cable TV Co.
326 Limited
Two Alarm Properties

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OCTOBER TERM, 1984

GULF COAST CABLE TELEVISION CO.,
Petitioner,

v.

AFFILIATED CAPITAL CORP.,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

For the reasons set forth herein, respondent Affiliated Capital Corp. opposes Gulf Coast Cable Television Co.'s Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE

Gulf Coast Cable Television Co.'s ("Gulf Coast") statement of the case contains two critical omissions. *First,* it fails to describe the factual detail of its unlawful conduct. Most of this conduct simply cannot be char-

acterized as "traditional political tactics."[1] The unlawful agreement superceded politics as well as competition. *Second,* the statement ignores the recent passage of the Local Government Antitrust Act of 1984.[2] That Act largely confines the impact of the decision below to a limited number of cases filed before its enactment, and contains legislative history supporting the outcome below.[3]

THE FACTS AND PROCEEDINGS BELOW

Respondent Affiliated Capital Corp. ("Affiliated") sought a cable television franchise in Houston in 1978. It was the only local applicant found qualified by the City which did not receive a franchise. At trial Affiliated proved that its failure to obtain a franchise resulted not from politics or competition, but from an anticompetitive agreement involving Gulf Coast to eliminate competition over the terms of cable franchises. The City participated in the anticompetitive agreement by the mayor's secret deal to ensure that a business associate of his would be included in the anticompetitive conspiracy.[4] The evi-

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1. The record contains *no evidence* of any traditional political activities by Gulf Coast and its conspirators.

2. Pub. L. No. 98-544 (1984). For a portion of the text, see note 38 *infra.*

3. See legislative history quoted at p. 17 *infra.*

4. Houston has a strong mayor form of government. The general partner of defendant Gulf Coast testified that Mayor James McConn negotiated to get his personal lawyer in on the package deal:

> [T]he mayor stated, he said, "Bill, I hate to ask you this," he said, "my lawyer, Marvin Katz, helped me during my dark days and helped me during the time that I was having problems financially, and he and a group headed by a Mr. Goldstein and a Mr. Rudy would like to apply for a small franchise area, 25,000 homes, more or less, in your client's territory."

Appellant's appendix below at 214. Gulf Coast then cut Mr. Katz's group into the deal. Appellant's appendix below at 215-17.

dence showed that Affiliated's downfall also occurred in part because of its refusal to participate in territorial market division with Gulf Coast and other applicants.

The trial court submitted the case to the jury under the rule of reason on two liability theories: one based on market division, and the other based on other anticompetitive practices with an exclusionary effect.[5] The jury received extensive instructions on the *Noerr-Pennington* privilege, the sham exception to *Noerr-Pennington,* and a "legislative process" immunity.[6]

Gulf Coast offered no evidence of *any* redeeming virtues of its anticompetitive practices. There could be none. The agreement eliminated competition between the parties to the agreement and restricted competition from non-conspirators. Similarly, despite an intimation to the contrary in the Petition for a Writ of Certiorari ("the Petition"), the City did not conceive of, nor did it require, the initial anticompetitive agreements between the potential competitors. To be sure, after the conspiracy was well underway,[7] Mayor James McConn became an active participant in the unlawful agreement by requesting that the largest applicant, Gulf Coast, make room for an additional franchise to be owned by a business associate who had helped him financially.[8] Other city officials may have

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5. Plaintiff had pursued these as separate theories, on the assumption that market division, but not the other practices, would be tested by the per se rule.

6. The court below reprinted the *Noerr-Pennington* and sham instruction, 735 F.2d at 1566-67 n.6 (petitioner's appendix at A-23-24).

7. For the timing of the mayor's entry in the conspiracy, see Reply Brief to Supplemental Brief for Rehearing En Banc by Gulf Coast Cable Television, filed below, at 2-4, and citations and record references therein.

8. See note 4 *supra.*

become participants by requesting that Affiliated seek approval of the private conspirators to obtain a franchise.[9] The jury found that Gulf Coast and others, including Mayor James McConn, participated in a conspiracy to restrain trade which proximately caused damage to Affiliated.

In motions for a directed verdict and judgment n.o.v., the district court considered and rejected Gulf Coast's argument that *Noerr-Pennington* protected its anticompetitive conduct. Affiliated responded before the district court and on appeal that (1) the challenged conduct—a private agreement to present a package deal without competition—did not constitute petitioning conduct; (2) any petitioning conduct by Gulf Coast was a sham because prior anticompetitive agreements already had determined the outcome; and (3) the mayor's unlawful participation in the private deal to obtain a place in the conspiracy for his business associate eliminated the applicability of *Noerr-Pennington* to agreements between the private conspirators and the mayor.[10] The trial court, in an extensive opinion, found it necessary to rule only on the last of these three arguments.

After considering the case law, the district court shaped a principle that protects traditional political activity without immunizing antitrust violations in which a municipal official actively participates:

> The Court interprets the decisions rendered pursuant to the authority of *Noerr, Pennington,* and *Parker* as suggesting the following result. When a restraint of trade is the result of valid governmental

9. *See, e.g.,* 735 F.2d at 1558-59 (petitioner's appendix at A-7-8).

10. *See* Brief for Appellant at 37-46; Reply Brief for Appellant at 8-12; and Reply Brief to Supplemental Brief for Rehearing En Banc by Gulf Coast Cable Television at 14-18.

> action which was induced by the joint efforts of private parties, those joint efforts are shielded by *Noerr-Pennington* immunity. When, however, the governmental action is rendered invalid by the illegal, not merely unethical, conduct of the government entity acting as a co-conspirator, the joint efforts of the private parties are not automatically entitled to immunity.

519 F. Supp. at 1024-25 (petitioner's appendix at A-123-124). The court applied this test to the facts to sustain the jury's verdict on liability.[11] Since the court denied *Noerr-Pennington* protection because of the unlawful acts of the City, it found it unnecessary to analyze the facts supporting application of the sham exception.[12] The initial Fifth Circuit opinion adopted without discussion the district court's extensive treatment of *Noerr-Pennington*.[13] Nine judges of the *en banc* panel also approved the district court's analysis, noting that the jury instruction on *Noerr-Pennington* "was favorable to the defendants."[14] Those judges not only reviewed the evidence to confirm the factual predicate for the co-conspirator exception,[15] but noted that the record contained evidence which would support a finding of sham.[16] Judge Higginbotham, concurring, noted that the Court had decided only a very narrow *Noerr-Pennington* issue:

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11. 519 F. Supp. at 1012-26 (petitioner's appendix at A-99-126).

12. *Id.* at 1013 (petitioner's appendix at A-102). At that page in note 22 the district court noted that where "the conduct of the private parties is infected or invalidated by the illegal conduct of the public officials," the labels "sham" and "co-conspirator" both may be appropriate, with like effect.

13. 700 F.2d at 237 (petitioner's appendix at A-57).

14. 735 F.2d at 1566-67 n.6 (petitioner's appendix at A-23-24).

15. *Id.* at 1567 (petitioner's appendix at A-24).

16. *Id.* at 1567-68 (petitioner's appendix at A-24-25).

> In the present posture of this case there is no petition to the government at issue. We do not face a successful request for governmental action with anticompetitive results where the participation of government was confined to that of decisionmaker.

735 F.2d at 1571 (petitioner's appendix at A-32). The three dissenters from the *en banc* opinion, who thought that the agreement to restrict competition could not violate the antitrust laws once the City decided to award multiple franchises, did not express any disagreement with the majority's treatment of *Noerr-Pennington.*[17]

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I.

THERE IS NO CONFLICT OR INCONSISTENCY IN THE CIRCUITS

No circuit has ever held that *Noerr-Pennington* protects conduct of private individuals designed to facilitate a clear violation of the antitrust law by a municipality.[18] No circuit has extended the *Noerr-Pennington* privilege to communications between private individuals and a co-conspirator who happened to be a public employee. No circuit has disagreed with this Court's statement that: "Conspiracy with a licensing authority to eliminate a competitor may also result in antitrust transgression." *California Motor Trucking Co. v. Trucking Unlimited,* 404 U.S. 508, 513 (1972).

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17. *Id.* at 1573-74 (petitioner's appendix at A-36-38).

18. Correspondingly, courts have recognized that governmental acquiescence cannot legalize a private conspiracy. *See, e.g., Cantor v. Detroit Edison Co.,* 428 U.S. 579 (1976).

The "conflict in the circuits" contrived by petitioner arises from a misreading of *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975), in which the alleged antitrust violation amounted to a request for a favorable vote and a $50 campaign contribution by a franchise applicant to a mayor.[19] The Seventh Circuit *did not* reject the principle of a co-conspirator exception arising from private participation in unlawful municipal conduct.[20] The Seventh Circuit simply held that no conspiracy with a municipal official could be found on the facts. The court correctly held that the mayor's support for a particular franchisee did not by itself make the mayor a conspirator.[21]

The Seventh Circuit itself limited the holding of *Metro Cable* in *Kurek v. Pleasure Driveway & Park District of Peoria, Ill.*, 577 F.2d 580 (7th Cir. 1977), *vacated and remanded*, 435 U.S. 992 (1978), *reinstated*, 583 F.2d 378 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979).[22] After noting that *Metro Cable* did not entail a claim of governmental action violating the Sherman Act, the Seventh Court in *Kurek* concluded that subsequent case development had "undercut the validity" of the *Parker v. Brown* premises of *Metro Cable*.[23]

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19. In *Metro Cable*, plaintiff apparently complained that the defendant city chose to award only one franchise, a "monopoly." 516 F.2d at 229. Plaintiff's only evidence of a conspiracy to restrain trade was lobbying by two of the defendants and the campaign contribution. *Id.* at 230. At oral argument plaintiff acknowledged that the failure of the city council to hold a hearing was "the essence" of the case. *Id.* at 231.

20. *Id.* at 229-30.

21. *Id.* at 230.

22. *See* the district court's detailed analysis of *Metro Cable* and *Kurek*. 519 F.Supp. at 1018-19 (petitioner's appendix at A-110-112).

23. 557 F.2d at 589.

Critical references to the co-conspirator exception in cases in two other circuits are *obiter dicta* unsupported by careful analysis. At most they stand for the proposition that courts look critically at attempts by plaintiffs to avoid summary judgment on traditional *Noerr-Pennington* facts by making conclusory allegations of official participation in some loose "conspiracy." In *Federal Prescription Service v. American Pharmaceutical Association,* 663 F.2d 253 (D.C. Cir.), *cert. denied,* 455 U.S. 928 (1981), plaintiffs alleged that defendant, a trade association of pharmacists, conspired with state boards regulating pharmacies simply because pharmacists sat on those boards. The District of Columbia Circuit correctly found no conspiracy. In *First American Title Co. of South Dakota v. South Dakota Land Title Association,* 714 F.2d 1439 (8th Cir. 1983), *cert. denied,* ____U.S.____, 104 S.Ct. 709 (1984), defendants had lobbied the legislature to obtain a statute restricting the availability of title insurance. The Eighth Circuit stated that *Noerr-Pennington* protected this traditional lobbying, regardless of plaintiff's allegation that the state's Board of Examiners became a 'conspirator" by lobbying the legislature.[24]

None of the cases from other circuits cited by petitioner would have been decided differently under the carefully-crafted standard[25] articulated by the district court and adopted by the Fifth Circuit in this case.

The balancing of competing policies embodied in the Fifth Circuit's rule in this case squares well with the com-

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24. In the other Eighth Circuit case cited by petitioner, *Westborough Mall, Inc. v. City of Cape Girardeau,* 693 F.2d 733 (8th Cir. 1982), *cert. denied,* 461 U.S. 945 (1983), the court held there was no *Noerr-Penington* protection because defendants, including the City, acted fraudulently by misrepresenting the zoning classification of a tract.

25. See the standard quoted at pp. 4-5 of this brief.

mentary cited in the Petition. One commentator simply believed that the co-conspirator exception should apply only to situations in which the government officials have an interest in the success of the conspiracy and "take an active role in the defendant's activities."[26] Another commentator contended that a conspiracy should not be made of the "mere coincidence of the view of public officials and those doing the petitioning."[27] The last commentator cited by petitioner, on the scant analysis of a couple of early cases, thought the exception would prove unworkable,[28] but cases decided since that commentary have not supported that prediction.

The *en banc* opinion of the Fifth Circuit should dispel fears of inferences of conspiracy from routine legislative acts. The court articulated a rule balancing the important competing interests, a rule which should at least have an opportunity to be applied by other courts before consideration by this Court. After all, it is doubtful that any circuit will fail to apply the co-conspirator exception altogether when that failure would immunize private parties who benefit from unlawful governmental conduct, leaving the municipality alone holding the bag.[29]

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26. Kintner & Bauer, *Antitrust Exemptions for Private Requests for Governmental Action: A Critical Analysis of the* Noerr-Pennington *Doctrine,* 17 U.C.D. L. Rev. 549, 585 (1984).

27. Bern, *The* Noerr-Pennington *Immunity Petition in Light of* City of Lafayette's *Restriction on the State Action Immunity,* Ariz. St. L.J. 279, 300-01 (1980).

28. Fischel, *Antitrust Liability for Attempts to Influence Government Actions: The Basis and Limits of the* Noerr-Pennington *Doctrine,* 45 U. Chi. L. Rev. 80 (1977).

29. Obviously municipal officials cannot petition themselves, and cannot avail themselves of *Noerr-Pennington.* Also, preventing private liability for conspiracies in which public parties would be liable reverses the principle of the Local Government Antitrust Act of 1984, which clearly immunizes public but not private participation in antitrust violations.

If there remains any continuing uncertainty about the facts upon which application of the co-conspirator exception is appropriate, the Court should examine a closer case than this one to define the factual distinctions. The trial judge who heard the evidence, Judge Carl O. Bue, Jr.,

> [P]erceive[d] no injustice in depriving Gulf Coast of *Noerr-Pennington* immunity on facts which demonstrate not only that public officials actively participated in an illegal conspiracy but also that the private parties involved were aware of and sought such participation.

519 F. Supp. at 1025 (petitioner's appendix at A-125).

II.

THE DECISION BELOW IS NOT ERRONEOUS AND WILL NOT HAVE NEW, DAMAGING CONSEQUENCES

The policy-based portion of the Petition requests this Court to grant the writ on essentially three grounds: (1) antitrust laws should not reach this type of conduct; (2) the mayor and other city officials did not conspire with Gulf Coast; and (3) the decision below will open the floodgates to similar lawsuits. The first two points amount to no more than a loud, but hardly original, complaint that the antitrust laws are too broad and too vague. Recently enacted federal legislation, as well as the historical lack of success by plaintiffs in antitrust cases concerning municipal action, undercut the third point.

A.

The Finding of Illegality by the Jury and by the Courts Below Does Not Represent a Novel Extension of Antitrust Law

The briefs of appellant below showed how the activities of Gulf Coast and its co-conspirators resembled closely those activities traditionally held to violate the antitrust laws. Agreements to divide markets and to refrain from competition on the terms of service in franchise applications clearly resemble the acts of anticompetitive bid-rigging which frequently have victimized cities and prompted liability. To effectuate the purpose of this conspiracy, the conspirators restricted competition from non-conspirators by welcoming a public official into the inner workings of the conspiracy. This resulted in one of the most pernicious antitrust violations imaginable. The agreement eliminated competition not only on price but also on all other terms and conditions of service. The conspirators could act without fear of effective entry by a non-conspiring potential competitor, because a top municipal official had become part of the conspiracy in exchange for the conspirators' agreement to let the official's business associate in on the deal.

Gulf Coast's policy analysis of the "far-reaching" consequences of the decision below begins with the mistaken premise that the *en banc* panel based its decision on a preference for competitive bidding to the exclusion of politics.[30] That analysis conveniently misses the point. Antitrust, since its earliest application, has condemned rigging of bids to municipalities.[31] Of course, nothing

30. Petition at 12.

31. *See, e.g., United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir.), *aff'd*, 175 U.S. 211 (1898).

prevents a city, or any other consumer, from rejecting the results of a competitive process. Yet the occasional use of non-competitive and even arbitrary purchasing criteria by consumers, or by municipal representatives, does not eliminate the need to preserve the availability of competitive alternatives arrived at by competitive processes, which is the function of antitrust law. And when Mayor James McConn helped eliminate all competitive alternatives to promote the interests of someone who had assisted him financially, he no more immunized the private parties' conduct than does a municipal official who discloses secret information to facilitate rigging of bids by a favored group of contractors.

Certainly both panels of the Fifth Circuit examined the background, competitive consequences, and motives of the franchising process. To a casual reader of the opinions, this may smack of judicial activism. In fact, this thorough discussion of the facts served only to permit analysis of Gulf Coast's contentions concerning (1) the purpose and effect of the challenged conduct under the rule of reason, and (2) the evidence of causation. This analysis of background does not imply judicial condemnation of all its features, as the Petition frequently suggests.

Gulf Coast extracts from the abundant evidence of causation two snippets of testimony about the political "muscle" of Gulf Coast. Yet the overwhelming preponderance of evidence in this three-week trial showed that the non-competitive "package deal," rather than any politics, accounted for Affiliated's loss. This Court can search the opinions and record below in vain for more than a few lines of testimony, elicited by leading questions from the mayor's own counsel, implying that politics as such had anything to do with the acceptance of the non-

competitive package put together by Gulf Coast and its conspirators. Indeed, while the briefs below by Gulf Coast contain some suggestions of Affiliated's political activities, they cite no evidence of any political activity by Gulf Coast. This was not a case in which the political muscle of one group of applicants prevailed over the lobbying power of other applicants. Instead, the mayor of Houston lobbied the original conspirators and obtained from them an agreement to permit entry into that conspiracy by one of the mayor's business associates. The conspiracy removed the franchise decision as far from the realm of politics as from the realm of competition.

It should come as no surprise (nor is it a "far-reaching consequence") that the legality of municipal activities actually would be tested at trial once this Court broadly expanded the recognized range of municipalities' potential antitrust liability.[32] At trial the jury must make a finding of causation. If the evidence shows and the jury concludes that competitive considerations in fact would have prevailed in the absence of conspiracy, appellate courts should not refuse to enter the verdict because it may be misapprehended as a requirement of competitive decision-making. That appears to be the "mischief" bothering Gulf Coast on pp. 17-18 of its Petition.

It is true, of course, that *Boulder* and *Lafayette* tipped the balance of the interests between economic competition and local autonomy in favor of antitrust. Those decisions reflected the preeminent, almost constitutional role of antitrust,[33] as well as the significance of the risks of

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32. *See, e.g., Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982).

33. *See, e.g., United States v. Topco Associates, Inc.*, 405 U.S. 596, 612 (1972).

predation by those utilizing governmental processes.[34] This Court's decisions permit state legislatures to immunize even the most blatant anticompetitive actions by clearly articulated statutes.[35] Absent such a mandate, however, cities and city officials could be liable in antitrust for displacing competition. Private beneficiaries of this type of unlawful governmental conduct obviously may encourage it, and the courts have held that the right to petition does not automatically protect the active, joint procurement by private interests of unlawful government actions.

The first amendment right to petition has never prevented liability for efforts to procure unlawful government action, such as attempts to bribe legislators or unlawfully influence the official actions of a judge or judicial clerk. Certainly James Madison conceived the right to petition for purposes other than protection for rigging franchise applications, dividing markets, and rewarding business associates of politicians.[36] Making the petitioning privilege turn on the legality of the municipality's conduct is no more "circular," as petitioner suggests, than condi-

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34. As Professor, now Judge Bork, has noted:

> Predation by abuse of governmental procedures, including administrative and judicial processes, presents an increasingly dangerous threat to competition. Antitrust law is beginning to catch up. . . .

R. Bork, *The Antitrust Paradox* 357 (Basic Books, paperback ed. 1978)

35. *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 52 (1982); *City of Lafayette v. Louisiana Light & Power Co.*, 435 U.S. 389, 414-15 (1978).

36. Recall that on first learning of the Bill of Rights from Mr. Madison, Thomas Jefferson complained to his friend that they should have included an express prohibition of monopolies. Monopolies such as those held by influential friends of the crown and ministry were regarded as particularly great threats to liberty in Mr. Madison's time. Their equivalents are no less so today.

tioning the legality of gifts to legislators on compliance with statutes regulating bribery and campaign contributions.

B.

The Law of Antitrust Conspiracy Should Not Be Reworked for this Case

This would be an odd case for this Court to review the evidentiary requirements necessary to satisfy the conspiracy requirement for restraints of trade. The Court's prior discussion of the issue recognizes that rules must be general enough to apply to a variety of cases and avoid creating safe harbors for the clever wrongdoer.[37] Identical policies would inform articulation of the evidentiary requirements of a co-conspirator exception. Any reasonable standard would defer to some extent to the trier of fact.

At page 14 the Petition assumes that the restraint of trade at issue in this case consists solely of the passage of a franchise ordinance, rather than the anti-competitive

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37. The leading cases defining sufficiency of evidence of antitrust conspiracy include *Monsanto Co. v. Spray-Rite Service Corp.*, ___U.S.___, 104 S.Ct. 1464 (1984); *United States v. Container Corp. of America*, 393 U.S. 333 (1969); and *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939). In contrast to the instant case, each of those cases addressed recurrent factual patterns which had been litigated extensively in lower courts. *Monsanto* clarified in general terms the test for sufficiency of evidence of conspiracy between dealers and manufacturers; the issue had fragmented the circuits, and panels within a circuit. *Container Corporation* attempted to resolve the nagging issue of when agreements to exchange prices became price-fixing conspiracies. *Interstate Circuit* made clear that a finding of conspiracy does not require evidence of direct conspiratorial communications. These cases offer well-reasoned guidance for determining the sufficiency of evidence of conspiracy.

package deal arranged by Gulf Coast. Only by this erroneous assumption can it then distinguish this agreement from traditional anticompetitive conspiracies.

A ruling by this Court in this case would have only limited application to future cases because of recently enacted legislation prospectively curtailing liability of municipalities and their officials. The Local Government Antitrust Act of 1984, passed after the ruling *en banc* in the instant case, provides broad immunity from civil antitrust actions for municipalities and their officials in cases filed after its enactment.[38] In certain circumstances it provides for relief from damages, but not from liability or injunctive relief, in pending cases against municipalities.[39] Since the reasoning of the courts below turns in large part on the conduct of the city official participating in the conspiracy, the sharp restriction of municipal liability in future cases may occasion a similar restriction in the availability of a co-conspirator exception to *Noerr-Pennington.*

Interestingly, the legislative history of the Act expressly acknowledges that the mayor's conduct in this case so far

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38. Section 2(a) of the Act provides:
Sections 4, 4A, and 4C of the Clayton Act (15 U.S.C. 15, 15a, and 15c) shall not apply to any law or other action of or official action directed by, a city, village, town, township, county, or other general function unit of local government in the exercise of its regulatory powers, including but not limited to zoning, franchising, licensing, and the establishment or provision of public services on an exclusive or nonexclusive basis in a manner designed to ensure public access or otherwise to protect the public health, safety, or welfare, but excluding the purchase or sale of goods or services on a commercial basis by the unit of local government in competition with private persons, where such law or action is valid under state law, except that this subsection shall only apply to cases filed after the date of enactment of this Act.

39. See section 2(b)(1) of the Act.

exceeded his official duties as to preclude immunity even under the broad sweep of the Act's protections. The House Judiciary Committee stated:

> The definition of official conduct allows good faith errors by the local government officials in conducting the public business. . . . On the other hand, participation in criminal acts, or other behavior clearly falling outside a local government's authority, would fall outside the definition of official conduct. *See Affiliated Capital Corp. v. City of Houston*, ____ F.2d____ (5th Cir. July 16, 1984) (en banc).

House Comm. on Judiciary, Local Government Antitrust Act of 1984, H. R. Rep. No. 965, 98th Cong., 2d Sess. 20.

The posture of this case makes it an inapt candidate for settling the law, since review of the issues presented by Gulf Coast would not determine even whether the *Noerr-Pennington* privilege should apply in this case. The court of appeals would still have to consider whether the jury verdict could be sustained by non-petitioning activity or "sham" petitioning. Judge Higginbotham has commented already on the lack of petitioning activity[40] and nine Fifth Circuit judges have suggested the sham nature of Gulf Coast's conduct.[41]

Whether petitioning amounts to a sham is an issue of fact. The trial court instructed the jury on the affirmative defense of *Noerr-Pennington*, as well as on the sham exception. Gulf Coast had the burden of proof on the availability of the *Noerr-Pennington* privilege. It did not object to the instruction that it had the burden.[42]

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40. 735 F.2d at 1571 (petitioner's appendix at A-32).

41. 735 F.2d at 1567-68 (petitioner's appendix at A-24-25).

42. *See* Reply Brief of Appellant below at note 26 for authorities and record references.

C.

The Ruling Below Will Not Open the Floodgates

Since conduct resembling that challenged here presumably is not the norm for municipal government, the floodgates argument would have been implausible even before the recent legislation. After all, this is the only case since *Lafayette* concerning municipal conduct so similar to traditional antitrust violations. It is one of only two cases involving municipal action known to respondent which has resulted in a jury finding of an antitrust violation. The Local Government Antitrust Act of 1984 will reduce the opportunities for similar facts to generate similar cases, and hence for application of the *Affiliated* test. As noted above, with the *en banc* decision before it, Congress chose not to alter the outcome or reasoning of this case. If the *en banc* decision does in the future prevent the exact conduct challenged here, that is all the more reason to let it stand.

If this Court wishes to extend *Noerr-Pennington* immunity to all communications between private parties who agree to limit competition between themselves whenever that agreement influences government action, it can do so in a similar case which has been briefed and argued already in this Court—*Southern Motor Carriers Rate Conference, Inc. v. United States*, No. 82-1922.[43]

CONCLUSION

Someday this Court may be asked to review a case that goes too far too fast in penalizing genuine petitioning

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43. Arguments made against such an expansion of *Noerr-Pennington*, arguments which apply with equal force in this case, can be found in Brief of the United States at 33-36, *Southern Motor Carriers Rate Conf., Inc. v. United States*, No. 82-1922.

that results in an unlawful act of local government. This is not the case. Gulf Coast points to no first amendment value protected by the conspirators' elimination of competition between themselves and by their ability to exclude potential competitors. Delay in the ultimate disposition here would simply raise doubts whether a venal, anticompetitive arrangement could escape the scrutiny of antitrust.

If lower courts in the future must decide with some frequency the legality of communications between private and public persons found at trial to be co-conspirators, nine judges of the Fifth Circuit *en banc* have adopted a sophisticated rule which correctly balances the relevant competing interests. Henceforth courts can test the rule's application to truly political activity on the facts of particular cases. If lower courts rarely will confront this issue—as evidenced by the case law in seven years since *City of Lafayette* and the likely consequences of the new legislation—then this Court's opinion on an issue examined by so many judges below (with no dissent on the issue urged by petitioner) becomes unnecessary.

The petition for writ of certiorari should not be granted.

Respectfully submitted,

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This is to certify that on the 14th day of January, 1985, three true and correct copies of the foregoing document were forwarded to counsel of record by first class mail.

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(5)

No. 84-951

Supreme Court, U.S.
FILED
DEC 20 1985
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GULF COAST CABLE TELEVISION CO.,
Petitioner,

v.

AFFILIATED CAPITAL CORP.,
Respondent.

SUPPLEMENTAL BRIEF FOR PETITIONER IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-951

GULF COAST CABLE TELEVISION CO.,

Petitioner,

v.

AFFILIATED CAPITAL CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

The government agrees that the court of appeals' decision is wrong. The government agrees that the so-called co-conspirator exception to *Noerr-Pennington* has been improperly applied below to impose antitrust liability on the basis of conduct that was "indistinguishable from the give and take of municipal politics in much of America" (U.S. Br. 9). The government does not question that the validity and scope of the co-conspirator exception are squarely presented in this case. And the government does not suggest that there is any procedural obstacle to hinder the Court's consideration of the important questions presented.

Nevertheless, the government rather hesitantly counsels against review by this Court of a judgment that by now comes

to more than $9 million (including interest and attorneys' fees) and that has no basis other than that "the mayor and council members [of Houston] engaged in a political process in making the franchising decisions" (U.S. Br. 11). Its reasons are weak.

1. That the facts of the case may be "unappealing" or involve "some of the less edifying (if not wholly unfamiliar) aspects of local politics" (U.S. Br. 10, 11) does not bear on the unsoundness of the co-conspirator exception to the *Noerr-Pennington* doctrine. That exception is generated only in cases having claims of undue cooperation between private actors and public officials, and it thus serves to condemn under the antitrust laws political activities that seem "unappealing," though "not wholly unfamiliar" and therefore obviously not limited to this case. After all, *Noerr* itself involved what the Court termed "reprehensible" conduct. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 145 (1961).

2. The government agrees that liability in this case and immunity in *Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975) are "divergent," and that "the result should have been the same in both cases." But it questions whether there is "true conflict" because the *Metro Cable* court might have imposed liability on the present facts; it might, on the government's view (U.S. Br. 11-12), have made the same mistake as the Fifth Circuit. By such reasoning, the tenuous co-conspirator exception is so difficult to apply correctly that the lower courts will repeatedly err. This counsels for, not against, immediate review by this Court.

3. In the last paragraph of its submission, the government considers whether two "prudential" reasons may count against review by this Court: first, that cases "raising claims based on an alleged co-conspirator exception to *Noerr-Pennington* have been infrequent" (U.S. Br. 12); second, that the Local Government Antitrust Act of 1984 may diminish the importance of the decision below.

(a) The co-conspirator exception in fact has been raised in a large number of cases: we are aware of over two dozen decisions that made their way into the reports;[1] unreported cases obviously are far more numerous. And the court of appeals' decision below has been specifically cited as a basis

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1 *See, e.g.*, *Harman* v. *Valley National Bank*, 339 F.2d 564 (9th Cir. 1964); *E.W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966); *Independent Taxicab Operators' Ass'n* v. *Yellow Cab Co.*, 278 F. Supp. 979 (N.D. Cal. 1968); *Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969); *Israel* v. *Baxter Laboratories, Inc.*, 466 F.2d 272 (D.C. Cir. 1972); *Duke & Co.* v. *Foerster*, 521 F.2d 1277 (3d Cir. 1975); *Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975); *Cow Palace, Ltd.* v. *Associated Milk Producers, Inc.*, 390 F. Supp. 696 (D. Colo. 1975); *Czajkowski* v. *State of Illinois*, 460 F. Supp. 1265 (N.D. Ill. 1977), *aff'd*, 588 F.2d 839 (7th Cir. 1978); *Whitworth* v. *Perkins*, 559 F.2d 378 (5th Cir. 1977), *vacated on other grounds*, 435 U.S. 992 (1978); *Miller & Son Paving, Inc.* v. *Wrightstown Township Civic Ass'n*, 443 F. Supp. 1268 (E.D. Pa. 1978), *aff'd*, 595 F.2d 1213 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979); *Mason City Center Associates v. Mason City*, 468 F. Supp. 737 (N.D. Iowa 1979); *Huron Valley Hospital, Inc.* v. *Pontiac*, 466 F. Supp 1301 (E.D. Mich. 1979), *vacated on other grounds*, 666 F.2d 1029 (6th Cir. 1981); *Federal Prescription Service* v. *American Pharmaceutical Ass'n*, 663 F.2d 253 (D.C. Cir.), *cert. denied*, 455 U.S. 928 (1981); *In Re Airport Car Rental Antitrust Litigation*, 521 F. Supp. 568 (N.D. Cal. 1981), *aff'd*, 693 F.2d 84 (9th Cir. 1982), *cert. denied sub nom. Budget Rent-A-Car* v. *Hertz Corp.*, 462 U.S. 1133 (1983); *Atlanta* v. *Ashland-Warren, Inc.*, 1982-1 Trade Cas. (CCH) ¶ 64,527 (N.D. Ga. 1981); *Westborough Mall, Inc.* v. *City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983); *Hospital Building Co.* v. *Trustees of Rex Hospital*, 691 F.2d 678 (4th Cir. 1982), *cert. denied*, 464 U.S. 890 (1983); *First American Title Co.* v. *South Dakota Land Title Ass'n*, 714 F.2d 1439 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042; *Campbell* v. *Chicago*, 577 F. Supp. 1166 (N.D. Ill. 1983); *Richard Hoffman Corp.* v. *Integrated Building Systems*, 581 F. Supp. 367 (N.D. Ill. 1984); *Scott* v. *Sioux City*, 736 F.2d 1207 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 1864 (1985); *Independent Taxicab Drivers' Employees* v. *Greater Houston Trans. Co.*, 760 F.2d 607 (5th Cir.), *cert. denied sub nom. Arrow Northwest, Inc.* v. *Greater Houston Trans. Co.*, 106 S. Ct. 231 (1985); *Llewellyn* v. *Crothers*, 765 F.2d 769 (9th Cir. 1985); *Greenwood Utilities Commission* v. *Mississippi Power Co.*, 751 F.2d 1484 (5th Cir. 1985); *Blank* v. *Kirwan*, 216 Cal. Rptr. 718, 703 P.2d 58 (Sup. Ct. Cal. 1985); *Pumpkin Air, Inc.* v. *City of Addison*, 608 F. Supp. 787 (N.D. Tex. 1985).

for denial of summary judgment. *Pumpkin Air, Inc.* v. *City of Addison*, 608 F. Supp. 787, 792 (N.D. Tex. 1985). That the case at bar may well be the first case in which the exception actually resulted in liability makes it appropriate for certiorari, not the reverse, for the doctrine has worked substantial mischief even when it has not resulted in liability. Allegations arguably falling within the exception are easy to make and generate extended discovery, many motions, and trials. Cases such as this are invariably a great expense, and an improper federal intrusion into local government motives and processes. If, as the government says, the co-conspirator exception rarely has been a bride, it nevertheless imposes enormous, recurring costs and burdens by way of wedding preparations.

Avoidance of this expense and burden on the federal courts, on local and state governments, and on private litigants is particularly important in light of the constitutional underpinnings of the *Noerr-Pennington* doctrine. As this Court has often recognized in First Amendment cases, prompt review by this Court is essential lest lawful political activity be chilled during the period while disputed legal issues "percolate" in the lower federal courts.[2] The prospect of multimillion dollar antitrust judgments will have a similar inhibiting effect upon protected activities.

The decision below encourages still further litigation over a questionable "co-conspirator" doctrine that was spawned by a passing comment from this Court and that has already percolated in the lower courts for over 20 years. Such litigation adds to the explosion of municipalities' litigation expenses, which already impede their ability to obtain insurance.[3]

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2 *Cf. Lamont* v. *Postmaster General*, 381 U.S. 301 (1965); *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 461 (1958); *American Communications Association* v. *Douds*, 339 U.S. 382, 402 (1950).

3 *See, e.g., Towns Finding it Difficult to Get Affordable Insurance*, N.Y. Times, June 23, 1985, Sect. 11CN at 1, col. 1; *Municipalities Face Dramatic Jumps in Insurance Costs*, Associated Press, November 19, 1985 (available on LEXIS, Nexis library, Omni file).

(b) The Local Government Antitrust Act of 1984 in no way moots the co-conspirator exception to *Noerr-Pennington*. It does not affect private liability for petitioning of federal, state, or local governments. It does nothing to prevent declaratory or injunctive suits against anyone. Nor does it affect in any way the possible "co-conspirator exception" to *Parker* v. *Brown*, 317 U.S. 341, 351-52 (1943).[4]

4. The government, as the nation's leading enforcer of the antitrust laws, has made its principal contribution here as amicus by announcing its view that the decision below is wrong and explaining its reasons for that conclusion. It is important that the Court accept certiorari and itself consider the views shared by petitioner and the government.

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4 At the same time, one of the more mischievous features of the decision below is that it has already caused concern among cities that its rationale conflicts with that underlying the Act. The general counsel to the United States Conference of Mayors, citing the decision below, recently wrote:

> [Under the Act] active local government supervision of the private individual's conduct . . . will have to be demonstrated. This analysis is likely to result in pressure for ongoing local-government supervision by private parties receiving anti-competitive benefits or privileges.
>
> The accomodation of private party demands for "active supervision" by local government, however, will be seen by excluded parties, and possibly by the courts, as evidence of an antitrust conspiracy between local government, or its officials and employees, and the favored party.

S. Rubin and S. Chapple, *Supreme Court Places Limits on Suits Against Local Government*, National Law Journal, June 3, 1985 at 20, 21.

Conclusion

For all the foregoing reasons, for the reasons stated in the petition and reply brief, and for many of the reasons stated in the government's brief, the petition for a writ of certiorari should be granted.

December 20, 1985

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NO. 84-951 (6)

GULF COAST CABLE TELEVISION CO.,
Petitioner,

v.

AFFILIATED CAPITAL CORP.,
Respondent.

SUPPLEMENTAL BRIEF FOR RESPONDENT IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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IN THE

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NO. 84-951

GULF COAST CABLE TELEVISION CO.,
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AFFILIATED CAPITAL CORP.,
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SUPPLEMENTAL BRIEF FOR RESPONDENT IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

I. THE BRIEF OF THE UNITED STATES CORRECTLY URGES THE COURT TO DECLINE REVIEW.

A. There Is No Split in the Circuits.

The United States agrees that the law expressed in the decision below does not conflict with *Metro Cable Co. v. CATV of Rockford, Inc.*, 517 F.2d 220 (7th Cir. 1975). After all, the *Noerr-Pennington* test articulated by this district court and adopted by the Fifth Circuit explicitly recognizes that "valid governmental action which was induced by" efforts of private parties is

"shielded by *Noerr-Pennington* immunity."[1] In *Metro Cable* the plaintiff complained simply that the city council did not vote for it. It offered no proof of an agreement between private applicants for franchises not to compete with each other, much less evidence of any participation in such a conspiracy by a local official. The Seventh Circuit's conclusion that a legislative act alone does not prove conspiracy is consistent with the Fifth Circuit's limit on *Noerr* where a jury finds participation by a governmental official in a conspiracy between private persons. As a result, in its brief the government cannot say that the Fifth Circuit would have disposed of *Metro Cable* any differently than did the Seventh Circuit.[2]

B. No Important Policy Justifies Review.

1. *The ruling has limited applicability.* The government correctly observes that this is the first case to rest liability in part on the fact that government officials actively participated in a conspiracy to restrain trade.[3] Petitioner responds that numerous courts have referred to the co-conspirator exception.[4] The fact that so many courts have considered the co-conspirator exception and found it inapplicable to their facts indicates that they have had little difficulty understanding its narrow scope.

So petitioner must claim that unsuccessful allegations concerning official participation in antitrust violation have

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1. Pet. App. at A-123-24.

2. Brief of Amicus Curiae at 12.

3. Brief of Amicus Curiae at 12. The co-conspirator exception accounts only in part for the treatment of *Noerr-Pennington* in the instant case. See the court of appeals' treatment of the sham exception. Pet. App. A-24-25.

4. Supplemental Brief for Petitioner at 3.

caused "substantial mischief" by generating "many motions, and trials." This alarm is ill-founded.[5] The fact that plaintiffs in some twenty reported cases over twenty years have failed to prove official participation in anticompetitive conspiracies should not counsel elimination of this doctrine any more than it would any legal doctrine based on important federal legislation and strong public policies. After all, more mischief surely would result from a catagorical declaration that private parties desiring not to compete for public contracts can conspire at will simply by letting a government official secretly share in the action.[6] Despite the fact that no public purpose requires immunity for anticompetitive private conduct inducing unlawful action by a government official, immunity for such conduct would follow abolition of a co-conspirator exception to *Noerr-Pennington*. No doubt that explains why this Court has been careful not to extend *Noerr* to cases involving official misconduct.[7]

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5. Petitioner is not aware of and can find no evidence of any trials besides this, much less "many" trials, which have encompassed the issue of the co-conspirator exception.

6. The record in the only case relying on the court of appeals' decision to deny summary judgment, *Pumpkin Air, Inc v. City of Addison*, 608 F. Supp. 787 (N.D. Tex. 1985), amply illustrates the necessity of a co-conspirator exception of some sort. In that case plaintiffs alleged and obtained deposition testimony that the mayor of a small town received secret cash payments from the operator of a local airport, and proceeded to obtain large FAA grants for the airport in the City's name and assist the operator in illegal activity to exclude all competitors for the sale of fuel at that airport. *See* Class Plaintiff's Response to Motion for Summary Judgment, filed December 31, 1984, C.A. No. 3-82-1135-F (N.D. Tex.).

7. *California Motor Trucking Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972). *Cf. United Mine Workers v. Pennington*, 381 U.S. 657, 671 (1965) (noting that plaintiff complained of "an act of a public official who is not claimed to be a co-conspirator.")

2. *Congress recently refused to immunize the conduct in this case.* The United States is certainly correct that Congress already has extensively reviewed and addressed issues arising from municipal liability and antitrust, including this case.[8] Congress could have altered the result in this case, and it declined to do so. This Court is reluctant to expand immunities to the antitrust law. *See, e.g., City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 397-99 (1978). It should be particularly disinclined to do so when Congress itself has recently passed judgment on the issue.

3. *The decision below does not frustrate important public policies.* Neither the government nor even petitioner claims that any antitrust or broader public interest would be served by encouraging the actions challenged in this case. Petitioner can only argue that courts will reach too far, chilling genuine political activity and increasing the litigation expenses of municipalities. This Court should give no more credence to this parade of horribles than did Congress. It takes no legal genius to discern, as does the United States, that this case involves "unusual" facts about a private scheme to rig the bids for a franchise while cutting a public official's creditor in on the action to smooth the scheme's success. Penalizing that conduct threatens no important first amendment interest of political expression. If this Court's *Boulder*[9] decision has any force, it must allow the law to reach this type of anticompetitive behavior.

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8. *See* Brief in Response to Petition at 17.

9. *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982).

4. *Review would delay justice and encourage relitigation of facts on appeal.* Not only did the lower court's decision serve the interest of the antitrust laws, but plaintiffs deserve a reasonable end to litigation when they have successfully vindicated important public interests in free competition. Petitioner complains that the co-conspirator exception encourages many motions and trials. Respondent sympathizes with at least the object of the complaint: plaintiff is without a judgment three years and nine months since a jury verdict on which an overwhelming majority of the judges on the Fifth Circuit agree that judgment should have been entered. Those judges have had the opportunity to review the record in its entirety. Of course, the district court also fully instructed the jury on the *Noerr-Pennington* doctrine, and the jury considered the evidence in that light. If this Court undertook review, and reviewed the evidence to disagree with the court of appeals' application of the law to the facts concerning the local official's participation in the conspiracy, it would have to remand for yet another Fifth Circuit decision on the sham exception and the applicability of the per se rule to territorial market division. That, in turn, could extend the litigation for several more years. Already plaintiff has had to incur almost a million dollars in legal fees, much of it in extensive appeals and post-verdict briefing. Defendant has been encouraged to prolong this litigation since nowhere can it borrow money at the rates at which post-judgment interest accrues. Accepting certiorari in this case will not reduce congestion of the courts as petitioner urges, but instead will encourage numerous appeals by litigants attempting to relitigate application of law to the facts even before the highest Court of law.

II. THE UNITED STATES INCORRECTLY CRITICIZES APPLICATION OF THE LAW TO THE FACTS BELOW.

The United States acknowledges that unreasonable restraints of trade do not become lawful merely because "they require government approval, or acquiescence, in order to take effect."[10] The United States does not contest that "[c]onspiracy with a licensing authority to eliminate a competitor may also result in antitrust transgression."[11] Finally, the United States does not disagree with or even question the lower courts' careful test for determining whether the participation of government in an anticompetitive scheme extends to private parties a privilege against antitrust liability.[12]

Instead, the United States gratuitously opines that the district court, a panel of the Fifth Circuit, and a lopsided majority of the Fifth Circuit *en banc* incorrectly applied the law to the facts of this case. It rests its analysis on an odd characterization of the challenged conduct as being "indistinguishable from the give and take of municipal politics in much of America."[13] The government offers this conclusion while acknowledging two pages later that "the facts of this case . . . are unusual,"[14]

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10. Brief of Amicus Curiae at 10.

11. *California Motor Trucking Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972).

12. *See* the district court's test, adopted by both the Fifth Circuit's panels, at Pet. App. A-123-24, quoted in Respondent's Brief at 4-5.

13. Brief of Amicus Curiae at 9.

14. *Id.* at 11.

and while disregarding evidence in the record that the franchising process at issue here was highly unusual.[15]

The government adopts the theory recently advanced by petitioner that politics accounted for plaintiff's injury. From three weeks of testimony, however, neither petitioner nor the government can cite to testimony that traditional political activity had anything to do with the award of franchises.[16] At trial, though obviously not on appeal, petitioner argued that it obtained a franchise based on the merits of its franchise application. When witness after witness contradicted this position, which accounted for the length of the trial, the jury did not believe that story. The record contains no evidence of any public announcement or mandate that a handful of applicants for franchises should agree not to compete on the merits of their franchise applications. Although the court of appeals painted with a broad brush when indicating that the mayor wanted certain applicants to cooperate, the actual record noted in more detail by the lower courts shows that many city officials, much less potential competitors or the public, were never told of this procedure.[17]

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15. *See* Pet. App. at 52-53 (referring to expert testimony concerning the franchising experiences of other cities).

16. See discussion at Response to Petition at 12-13.

17. *See* court of appeal's opinion n.5, Pet. App. A-10-15; district court opinion, Pet. App. A-76-86. The Court of Appeals *en banc* cited one page of the record saying that the conspirators excluded others at the mayor's "behest." Pet. App. A-15. Other than meetings with the conspirators in which the mayor advanced the cause of his creditor, there was never any evidence that this occurred. Though Mayor Jim McConn surely may have discussed the matter in private, a refusal to compete for franchises did not occur by official direction. The City received a package submitted as a *fait accompli*.

The private conspirators needed no encouragement. Indeed, evidence cited by the courts below shows that private applicants for franchises agreed not to compete on terms and conditions of services, agreed not to compete for territories, and agreed to offer the creditor of the mayor a piece of the action if they could then veto the applications of others. In short, plaintiff below complained of far more than what the government calls "the legislative franchising process itself." If, indeed, the trial had revealed any evidence that private applicants somehow were compelled to conspire by government action, petitioner would have asserted that as a successful defense under *Parker v. Brown* and *Goldfarb*.

Part of the government's mischaracterization of the record results from its refusal to consider evidence of market division by private franchise applicants, despite the relevance of this evidence to their intent to exclude competition.[18] The fact that the jury stumbled on an awkwardly-worded interrogatory to them on "boundary agreements," which plaintiff objected to, does not diminish the force of this evidence of market division concerning the conspiracy of private applicants to limit competition between themselves and from outsiders.[19]

18. *See* Pet. App. at A-19.

19. The court of appeals explained how the jury interrogatory concerning boundary agreements apparently confused the jury. Pet. App. at A-17. The district court never asked the jury whether defendants restrained trade by agreeing not to compete for the same or overlapping territories.

III. THE GOVERNMENT'S CRITICISM OF THE LOWER COURT'S JUDGMENT DOES NOT SUPPORT REVIEW.

For the reasons set forth above, the United States' disagreement with the lower courts' application of law to the facts rests on the government's somewhat mistaken characterization of those facts. However, even should this Court be inclined to give more credence to the government's judgment concerning application of law to facts than to the judgment of three lower courts below, this Court should not grant review. "A court of law, such as this court is, rather than a court for correction of errors in factfinding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).[20] This Court does "not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Moreover, since a matter of the application of law to facts only affects the outcome of a particular case, the Court should not grant certiorari. "This court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judg-

20. *Accord, Rogers v. Lodge*, 458 U.S. 613, 623 (1982) (declining to reexamine lower court's finding of discriminatory intent, which usually requires legal characterizations of evidence). This principle should apply with even greater force when a court of appeals has twice reviewed the record, once *en banc*.

ment we are asked to review." *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974).

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is certify that on this the 30th day of December, 1985, three true and correct copies of the foregoing document were forwarded to counsel of record by first class mail.

WILLIAM H. WHITE

FILED
FEB 1 1985
ALEXANDER L. STEVAS, CLERK

No. 84-951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GULF COAST CABLE TELEVISION CO.,
Petitioner,

v.

AFFILIATED CAPITAL CORP.,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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1.

Affiliated nowhere denies that the issues raised by this case—the scope and viability of the "co-conspirator exception" to *Noerr-Pennington* immunity—are important and worthy of this Court's review. It merely maintains that "[s]omeday" (Response to Petition for Writ of Certiorari, hereinafter "Response," at 18), long after its $6.3 million judgment is secure, there will come a more appropriate time for this Court to examine these issues.

Affiliated's response candidly admits that the decision below newly empowers federal antitrust courts to regulate state and local political activity deemed undesirable. While recognizing the novelty of the Fifth Circuit's approach, respondent defends the result but ignores the circular logic from which it sprang.

Affiliated does not dispute that Gulf Coast and other franchise applicants "could [legally] conspire[ ] among themselves to petition the City for legislative action favorable to them even if their purpose had been to eliminate or limit competition from others . . . ." (A. 119) Nor is it disputed that a public official's "participation" in that conspiracy "through [his] influence in favor of [the petitioning parties]" does not vitiate *Noerr-Pennington* immunity. (*Id.*)

The courts below held that the *Noerr-Pennington* shield is removed when an official's involvement goes beyond "participation" to a level the Fifth Circuit called "active[ ] conspir[acy]" (A. 120) and "orchestration." (A. 117) But none of the opinions below articulated a standard for judging when legal "participation" becomes "illegal" conspiracy. The "sophisticated rule" Affiliated finds in the district court opinion merely repeats this tautology—"valid governmental action" does not violate *Noerr-Pennington*; "illegal" action destroys the immunity. (Response at 4-5) Affiliated does not even try to give content to the term "illegal," except by repeated reference to bribery as an example. Bribery, of course, was not present nor alleged here.

Affiliated suggests that the novel "rule" of this case should "have an opportunity to be applied by other courts." (Response at 9) The reverse is true: certiorari should be granted precisely in order to forestall application of the Fifth Circuit's subjective jurisprudence by other courts.

The Response attempts to transform the lower courts' vice of articulating no meaningful standard into a virtue, by celebrating the discretionary nature of the Fifth Circuit's new test. *See, e.g.*, Response at 18. Affiliated assures the Court that "[a]fter all," this flexible co-conspirator exception will only be applied when the courts think it appropriate. *Id.* at 9. The Fifth Circuit, of course, applied the exception in this case *because* of its unhappiness with Houston's political franchising process. (*See, e.g.*, A. 5) The Mayor's testimony concerning Gulf Coast's political muscle was not "snippet[ed]" out of the

record for purposes of this petition, as respondent suggests (Response at 12)--it was highlighted and relied upon by all the courts below. The evidence that Affiliated's defeat in the City Council was attributable to politics is what the Fifth Circuit focused upon and found intolerable.

Despite the Fifth Circuit's reliance upon that evidence, and in the face of Judge Higginbotham's explanation that courts must now decide whether local political activity is "justif[ied]" (A. 34), Affiliated maintains that the opinions below "may smack of judicial activism" only to the "casual reader." (*Id.*) Any reader, casual or careful, will perceive that the Fifth Circuit would have federal antitrust courts passing upon the purity of local political processes—an exercise that threatens both federalism and the administration of the antitrust laws. That brand of judicial activism calls for this Court's review and reversal.

2.

The co-conspirator exception has been rejected, in a virtually identical context, by the Seventh Circuit; it has been criticized by other circuits and by commentators; and it has never been previously applied to impose antitrust liability. The Response is barely able to muster a challenge to these facts.

Affiliated is no more able than the courts below to articulate a principled distinction between this case and *Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975). Much as the district court merely stated that the facts here "exceed" those in *Metro Cable*, the Response merely accuses Gulf Coast of "misreading" that decision. These assertions do not obscure the Seventh Circuit's holding that it would "abrogate the *Noerr* doctrine" to apply the co-conspirator exception on the facts of that case. Those facts included an agreement between the Mayor and an alderman "to use their best efforts to prevent plaintiff from getting a franchise . . . . '[In] exchange' each official was given 'a substantial sum' as a

campaign contribution." Because the Mayor acted "pursuant to [that] agreement" and brought "pressure . . . on the [City Council]," the Council disregarded the recommendation of its own License Committee and awarded the franchise to defendant rather than to plaintiff. 516 F.2d at 223. The parallels are striking.

No other court has been confronted with facts so similar to those here, but two other Circuits have explicitly questioned whether a co-conspirator exception should exist at all. *See* Petition at 10-11. Affiliated has no meaningful response to those cases, and its response to the commentators' uniform criticism of the co-conspirator exception is virtually to ignore it—with the exception of a rather surprising attack upon what may be the leading law review article in the field.[1] Affiliated dismisses Professor Fischel's 1977 condemnation ("the co-conspirator exception is unworkable and should not be recognized"[2]) as a mere "prediction" not supported by later cases, but in fact his words were quoted approvingly in 1983 by the Eighth Circuit and in 1981 by the District of Columbia Circuit. *See* Petition at 10-11.

3.

Respondent concedes both the uncertainty surrounding the co-conspirator exception and the novelty of the Fifth Circuit's approach (*see*, *e.g.*, Response at 9). But it contends that the law should not be "settled" by this Court in this case because Gulf Coast's conduct may have also constituted "sham" peti-

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1 D. Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. Chi. L. Rev. 80 (1977). Professor Fischel's article has been cited approvingly by this Court and in over a dozen Court of Appeals opinions.

2 The only possible exception recognized by Fischel might be where the official is acting solely to further his own direct economic interest, *e.g.*, bribery.

tioning unprotected by *Noerr-Pennington*. This contention is a red herring.

First, it is undisputed that Gulf Coast was making a *genuine* effort to influence government action; indeed, Affiliated's complaint here is that Gulf Coast was successful. Such conduct cannot be a "sham." *Clipper Exxpress* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1253 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1234 (1983).

Second, there was no holding below that Gulf Coast had engaged in "access-barring" (the *en banc* majority said it was not necessary to reach that issue), nor were there grounds for such a holding. Affiliated was never barred from access to the Houston City Council. *See Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F.2d 220, 232 (7th Cir. 1975); *Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Executive Board*, 542 F.2d 1076, 1079 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977) (defendants' efforts to exert political influence "have [not] in any way impaired [plaintiff's] ability fully to present its views . . . .").

Finally, even if there were a "sham" issue in this case, certiorari would be warranted to settle the law on the co-conspirator issue squarely presented by this record. After ruling on that point, this Court could of course remand to the Fifth Circuit to consider any subsidiary issues.

4.

Affiliated correctly acknowledges that the Local Government Antitrust Act of 1984[3] does not apply to the facts of this

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3 Pub. L. No. 98-544, 98 Stat. 2750 (1984). The language quoted at page 16 n.38 of the Response, purportedly § 2(a) of this Act, in fact appears nowhere in the statute as finally enacted. And Affiliated's attempt to rely upon a passing reference to this case in the statute's legislative history is unavailing. Congress nowhere endorsed the Fifth Circuit's application of the co-conspirator exception; indeed, it did not address the concept of a co-conspirator exception at all.

case. Notwithstanding that fact, respondent contends that enactment of the statute somehow lessens the likelihood that the co-conspirator exception will be applied in the future as the Fifth Circuit used it here. The new law (which restricts damages but not injunctive relief) does nothing to restrict the reach of any co-conspirator exception, and in fact does not affect the *Noerr-Pennington* doctrine at all. Under the Fifth Circuit's precedent, courts remain free to deny *Noerr-Pennington* immunity to private parties who petition the government, whenever a federal judge decides that political give-and-take includes "excessive" participation by a public official being lobbied.

The new statute actually highlights the danger. Because the statute equates municipal action with state action for purposes of private liability, it means that the Fifth Circuit's decision applies equally to state governments, and cannot be limited to cases involving municipalities. *See* Conf. Rep. No. 1158, 98th Cong., 2d Sess. 3.

5.

Finally, Affiliated suggests that certiorari is inappropriate here because of the pendency of *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, No. 82-1922 (U.S. argued Nov. 26, 1984). But Affiliated does not identify any opportunity available in that case to clarify the co-conspirator exception: in fact, no such opportunity even remotely presents itself.

* * *

For the reasons stated above and in the Petition for Certiorari, the petition should be granted.

February 1, 1985

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